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# GENERAL PRECEDENT

FOR

## Wills,

WITH

### PRACTICAL NOTES.

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SECOND EDITION,

WITH CONSIDERABLE ADDITIONS AND ALTERATIONS.

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By G. WORTHINGTON, Esq.

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## A D V E R T I S E M E N T.

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THE opinion expressed in the former edition, as to the utility of a General Precedent for Wills, has been confirmed by the sale of a large impression. No pains have been spared to render the present Edition more deserving of the flattering notice of the profession.

WARRINGTON,—*May, 1826.*



## PREFACE

TO THE FIRST EDITION.

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THE utility of a Precedent for Wills, adapted to general use, will prevent the necessity of any apology being offered to the Profession for an attempt to supply a deficiency which has been generally acknowledged. Without the least desire of detracting from the value of the books of precedents already published, it may be observed, that the forms of wills which they contain afford only partial assistance. Each will having been originally drawn to meet a particular case, the general object and scope of the instrument must necessarily be inapplicable to other cases. The same observations occur with respect to the forms to be found in the offices

of Solicitors. To obviate these inconveniences, and to furnish the draftsman with a general precedent, arranged on the most simple plan, is the object of the work.

The Clauses have been selected from the Precedents of most eminent Conveyancers; and the consent of those gentlemen, to whom some of the Precedents, in their complete form, in manuscript, belonged, has been most kindly and unreservedly given to their publication.

The Notes, which are the result of much labour and care, are added, from a desire to render the work as practical as possible.— It is hoped, they will enable the Student to judge of the operation of the different parts of the instrument he may be called upon to prepare; and also, that they will remove doubts which might otherwise harass and perplex his mind. But they are not intended to relieve him from the necessity of seeking for further information in the different treatises expressly written on the various subjects connected with this important part of professional knowledge.

**Whether the Work, undertaken with the views now explained, shall prove useful and worthy of attention, remains for the decision of a liberal and impartial Profession.**

**G. WORTHINGTON.**

*Warrington, 1824.*



## DIGEST OF THE PRECEDENT.

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**DIVISION I.**—Relates to the payment of debts, &c. and provides funds for the purpose, to be raised out of the personal estate; and if such source be insufficient, then to be raised out of the real estate, by sale or mortgage, *Page 23—65*.

**DIVISION II.**—Relates to legacies, general, specific, and charitable; and to annuities, *66—133*.

**DIVISION III.**—Comprises various modes of providing for the wife of testator, *133—166*.

**DIVISION IV.**—Relates to the trade of the testator, with directions as to the same being carried on for the benefit of the wife and children; or discontinued, according to the discretion of the trustees, *167—181*.

**DIVISION V.**—Comprises various modes of providing for the children of testator, out of pecuniary funds arising out of the personal estate, or from the sale of the real estate, *181—264*.

**DIVISION VI.**—Relates to the devise and settlement of real estate.— This division also contains general devises and bequests of all the testator's real and personal property to trustees, *264—407*.

**DIVISION VII.**—Relates to the residue of the real and personal estate; and concludes with various clauses of a general nature, *407*.

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## ARRANGEMENT OF VARIOUS WILLS,

### PROPOSED BY WAY OF EXAMPLE.

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*The following are not the only Clauses which might have been selected; others of a similar effect are contained in the Precedent.*

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#### I. *The property consisting of personalty only.*

Insert general or specific legacies, *see Index*, “*Legacies.*”  
A general bequest of the whole property to trustees, to collect  
and convert same into money, iv. 38.

to pay debts, legacies, &c. v. 39.

the residue to be invested in securities, *ib.*

Trustees to stand possessed of trust monies, *ib.*

to pay annuity to wife, iii. 154.

in trust for children of testator equally, for their lives,  
(the shares of married daughters to be for their sepa-  
rate use), and for their issue, according to the ap-  
pointment of parents; in default of appointment, in  
trust for sons of testator at twenty-one, and for  
daughters at twenty-one, or marriage, lxxi. 185.  
*See Index*, “*Children.*”

Bequest over in case of their death, lxxi. 185.

Provision for maintenance and education, and advancement, *ib.*  
Proviso that appointed shares shall be brought into hotchpot.

*See Index.*

Direction as to survivorship and accruer, lxxiii. 208.

Proviso against anticipation of dividends, cxxviii. 417.

Devise of estates mortgaged to testator, cxxxv. 438.

Appointment of guardians and executors, cxxxvi. 439.

Indemnity to persons paying money to trustees and executors,  
cxli. 450.

Power to change trustees, cxli. 451.

Indemnity to trustees, cxlii. 452.

Conclusion, &c. cxliv. 474.

**II. The property consisting of Real Estate as well as of Personality, the Real Estate not being considerable.**

Legacies, &c. as in No. I.

Devise of all the real estate and bequest of all the personal estate to trustees to sell, lxxxix. 270.

If necessary to recite and execute power of appointment, see clause lxxxviii. 268.

Indemnity to purchasers, lxxix. 278.

*As to money arising from sale.*

Trustees to stand possessed thereof, lxxxix. 279.

in trust to pay debts, legacies, &c. xviii. 62.  
to invest residue in securities, *ib.*

Provision for wife and trusts for benefit of children, as in No. I.

Declaration that provision for wife is in lieu of dower, lv. 161.

Insert devise of mortgaged estates and other clauses, as mentioned in No. I.

N. B. The addition of the *Clauses relative to trade*, (*see Index* "Trade,") will render either of the before-mentioned arrangements suitable for the will of a person in trade.

**III. The property consisting of real estate, to be settled on children, and of personality.**

Direction as to fund for payment of debts, iii. 37, and bequest of certain funds for the purpose, viii. 41.

If personal estate should be insufficient for payment of debts, the deficiency to be raised by sale or mortgage of real estate, xii. 47.

Indemnity to purchasers and mortgagees, xii. 51.

Bequest of legacies and of annuities charged on real estate, with powers of distress.—*See Index*, "Legacies," "Annuities."

*As to provision for wife.* [If out of personal estate, *see* No. I.]

Bequest of annual sum charged on estates, xlvi. 141; or of rents to be paid by trustees, xlix. 144; or limitation, by way of uses, of annual sum out of rents, l. 146.

Direction that provision for wife is in lieu of dower, lv. 161.

*As to settlement of the estates on the children.* [For the numerous limitations which may be required, *see Index*, "Devises."]

Declaration of the trusts of term for years, created under the limitations for raising money for payment of debts, securing annuity to wife, and raising portions for younger children, cii. 358.

Further declaration of the trusts of term for cutting down timber for repairs, &c. ciii. 361.

Subject to term, the rents to be renewed by persons next in re-mainder, civ. 364.

Cesser of term, cv. 365.

Power to trustees to receive rents during minorities, and direc-tions as to accumulations, c. 355.

Proviso to prevent vesting of leasehold estates in tenant in tail, until twenty-one. *See Index.*

Powers for tenants for life to charge premises with jointures, cvi. 366.  
and portions, cvii. 369.

If tenant in tail should be living at decease of testator, devise of tennancy for life in lieu thereof, cviii. 371.

Bequest of heir looms, and direction as to vesting of same, cxiv. 385.

Where estates are separately settled on an eldest and second son, &c. it may be necessary to insert shifting clause, cx. 377.

Devise of leaseholds for renewal, &c. powers to lease, to make partition, to sell and exchange, and power to trustees to re-voke uses, to effect partition, sale, or exchange. *See Index,* "Leaseholds," "Powers."

Trusts of money and personalty, for benefit of children as in No. 1.—If to be laid out in purchase of estates, *See Index.*

Insert devise of estates in mortgage and other clauses, as men-tioned in No. 1.

## **PRELIMINARY OBSERVATIONS.**

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**I. A WILL** (or more correctly speaking, a testament of chattels) requires the observance of scarcely any particular ceremony. If the *animus testandi* be clearly established, and suspicion of fraud be not induced, any paper writing, however informal, will be admitted to probate. But the Ecclesiastical Courts very properly view with the greatest jealousy and circumspection, all testamentary acts in the last stage of life, which are unaccompanied by the peculiar forms and observances established by custom and practice. Those Courts are, however, compelled to grant probate of informal papers, and it may be useful to consider the instances of informality which are permitted by the ecclesiastical laws of the realm.

**1. An instrument without date and without signature, and in the handwriting of a stranger, may be supported by evidence proving beyond a doubt that volition accompanied the act, and**

that there was testamentary intention and sufficient capacity on the part of the deceased (*a*).

On the other hand, the *animus testandi* being the point most anxiously inquired into by the Courts, they are not bound to admit to probate an instrument merely because it is regularly signed and attested, and is unaccompanied by fraud or collusion. But where it is requisite, inquiry will be entertained into every attendant circumstance calculated to explain the intention of the writer with regard to such instrument. And if the conscience of the Court be satisfied, on the production of sufficient evidence, that there really existed no intention to make a testamentary disposition of property by such paper, it will be rejected (*b*).

Where the *animus* can be established, papers, however informal, may, as already mentioned, be admitted to probate. It is true their informality or unfinished state raises a presumption of law unfavourable to their reception, but this may be repelled by satisfactory evidence (*c*).

The principle that the testamentary intention

(*a*) *Friswell v. Moore*, 3 Phill. 135. *Warburton v. Burrows*, 1 Add. 383.

(*b*) *Nichols v. Nichols*, 2 Phill. 180.

(*c*) *Bone and Newsham v. Spear*, 1 Phill. 345. *Thorold v. Thorold*, Ibid. 1. *Read v. Phillips*, 2 Phill. 122. *Denny v. Barratt*, Ibid. 575.

is the chief guide to the Courts, will be found to be constantly operative in all the decisions. Therefore, where formal execution of a will appears to have been intended, but not carried into effect, the instrument has been held invalid. As if a man were to sign a regular will, to which the usual attestation clause was written, but not subscribed by the witnesses, the Court would, in the absence of explanatory circumstances, reject the document; and reasonably so, because it is to be inferred that the writer intended to execute his will in the presence of witnesses, and that in his apprehension a will would be incomplete until it had been so executed and attested. But again (reverting to the same principle) we shall find that if it can be shewn that any act of God, technically so termed, intervened, and prevented the intended formal and complete execution of such last mentioned instrument, the Courts will receive the same as the will of the deceased (*d*).

2. When the practitioner is required to make the will of a person labouring under dangerous illness, it is prudent to take instructions for the will in a careful though concise form, and to require the testator to sign such instructions; if he be possessed of real estate,

(d) *Scott v. Rhodes*, 1 Phill. 12. *Harris v. Bedford*, 2 Phill. 177. *Thomas v. Wall*, 3 Phill. 23. *Beaty v. Beaty*, 1 Add. 154.

in the presence of three witnesses. Indeed, the omission of such precautionary measures can seldom be justified. Frequently the interests and comfort of a family have been secured by such prudential plan, in instances where the testator has died before a regular and formal will could be drawn and executed.

Probate of such instructions as containing the last will of the deceased will be granted, upon a special affidavit of the solicitor and of any other persons who may be privy to the circumstances.

It is proper that the instructions should be carefully read over to the testator, and signed by him, and duly attested. Cases have, however, arisen, where such instructions have been admitted to probate, although they have not been signed by the deceased; but the Court has been uniformly satisfied with the intention of the deceased, and has, in order to arrive at such assurance, scrupulously sifted and examined the evidence by which the papers were supported, and weighed every adventitious circumstance indicative of testamentary intention (*e*).

It appears moreover from the same class of cases, not to be absolutely necessary that the

(*e*) *Huntington v. Huntington*, 2 Phill. 213. *Musto v. Sutcliffe*, 3 Phill. 104.

instructions should be seen by the deceased, or read over to him. But then the most satisfactory and unequivocal testimony must shew that the deceased was well acquainted with their contents; that he had dictated them; that they were in every particular according to his wishes and intention; and lastly, that they were reduced into writing during his life, otherwise they would form a nuncupative will, and be inoperative, wanting the requisites prescribed by the statute of frauds (*f*).

Very peculiar circumstances will justify the taking of instructions for a will by interrogatories, which, if death intervene, will be entitled to the effect and operation of a will. But the greatest caution must be observed by the person interrogating; he should not allow any importunity to be used; and good feeling, as well as legal necessity, requires that he should be perfectly disinterested. It must appear that the sick person really had the desire to make the testamentary disposal without inducement or suggestion.

It may be useful to state the case of *Green v. Skipworth* and others, 1 Phill. 53, in which instructions communicated by interrogatories were admitted to probate. The deceased having been taken suddenly ill, desired the

(*f*) *Wood v. Wood*, 1 Phill. 357. *Sikes v. Snaith*, 2 Phill. 351.

immediate attendance of Mr. Evans, an attorney, to make his will. Evans, immediately on receiving the message, went to the deceased, and found him extremely ill, and although of perfect mind, yet unable from bodily pain to hold much conversation. The testator himself addressed Evans, saying, that he found himself scarcely able to talk. After a short interval, Evans observing that he was again preparing to speak, said, that it might save the testator unnecessary exertion, and would probably be the best means of carrying his purpose into effect, if he would allow him to ask a question or two; to which the deceased signified his assent. Mr. Kavanagh, the medical attendant, was in the room; and Evans, in his presence, proceeded by asking the testator, whether it was his wish to give any instructions for his will? To which he immediately replied, "I shall leave Mrs. Green all the stock, effects, and improvements, but as to any thing else, I will speak to you again, Sir." Whereupon Evans wrote down such reply with a black-lead pencil; and the same having been read over to the testator, he signified his approbation thereof; and Evans and Kavanagh subscribed their names in pencil. Mr. Wilson a relation, being in the house, was called into the room, and the clause was again read over to the deceased, and he was asked

by Evans, if that was what he wished ; to which he distinctly answered 'yes.' He was then also asked, if he wished to give any farther instructions as to farms, or otherwise ; but appearing to suffer an increase of pain and bodily illness, he replied 'not at present.' This question and reply were written down by Evans, and attested by him and Kavanagh. The several persons then left the room, but shortly afterwards they returned, at the desire of the testator, who was somewhat revived. The following question was then put ; the same having been first written down with a black-lead pencil by Evans—"In case of any thing happening to you, who do you wish to have your farms ? The Skipworths, Mr. Wilson, or who ?" To which he replied "Mrs. Green ;" and the question being again read over to him, he repeated the same answer. Mrs. Green being requested to withdraw ; the question was again put to him in her absence, and he again replied in the same manner : whereupon Evans wrote down the reply ; and he, together with two other witnesses, subscribed it. Immediately afterwards, his bodily pain much increasing, the deceased was rendered incapable of proceeding in giving further instructions, or of executing a more formal will ; and he died the following day.

Sir John Nicholl, on delivering judgment,

made the following observations. A will made by interrogatories is valid; but, undoubtedly, wherever a will is so made, the Court must be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of volition, than it would be in an ordinary case. But if there is clear capacity, if there is the *animus testandi*, and if the intention is or may be reduced into writing, the Court must pronounce for it. It has been observed, that the act was rather that of the persons by whom the deceased was surrounded, than of the deceased himself. But under the circumstances, the precautions used were very proper; the exertion of speaking might have been fatal, and have prevented him from proceeding to express what his intentions were. The resort therefore to question and answer was highly judicious; it was the best practicable mode of collecting his wishes and intentions, as far as he was capable of expressing them; and was adopted with the concurrence of the persons present, as well as of the testator himself.—The paper propounded was afterwards decreed by the Court to be entitled to probate; the facts, as represented, having been fully substantiated by the evidence of the several persons who were present during the transaction.

It has been said by the Courts, that the reading over of the instructions for a will, is

only required to shew that the paper is conformable to the directions of the deceased (*g*). But the careful practitioner will, in every possible case, by the exercise of all the caution which his judgment may dictate, diminish those difficulties which are necessarily attendant upon every informal instrument, and will not allow the interests of his client to rest upon any doubtful or difficult issue. Where full time and opportunity concur, it would, without question, be unsafe to rely upon any document short of a formal will complete in all its parts.

Again, where instructions can be proved to have been given by the deceased, they would be admitted to probate, although they were reduced into writing by a third person, (not the person to whom the instructions were given), in case they were committed to writing during the lifetime of the deceased, and in case sudden death intervened to prevent the due execution of a will. It is not therefore essentially and absolutely necessary, that the instructions should come from the testator to the person who is to prepare the instrument. But under these circumstances the instructions must be supported by the most satisfactory and unequivocal evidence (*h*).

#### Instructions for a will supported in the man-

(*g*) *Box v. Weatherby*, cited 2 Phill. 354.

(*h*) *Lowe v. Lewis*, 3 Phill. 109.

mer already mentioned, have been held to revoke a prior will of personal estate, even where the same instructions have neither been in the hand-writing of the deceased, nor signed by him, nor attested. Likewise, an unexecuted will, the draft of which had been read over to and approved by the deceased, has been admitted to probate, although it had remained unexecuted during the lapse of two months prior to the death of the deceased (i). It must however be observed that in the above cases particular circumstances, shewing the testamentary intention on the part of the deceased, were considered as sufficiently strong to rebut the legal presumption against such intention.

From the facility with which a prior disposition of personal estate may be revoked, a curious, and an apparent contradiction may arise. A devise of real estate cannot be altered or revoked by another will, unless the latter be signed in the presence of three or more witnesses. But a will, though disposing of real as well as of personal estate, may, as to the bequest of the personality, be revoked by a testamentary paper not signed, and unattested. Such revocation would not, however, affect the devise of the real property; and the revoking instrument, not being a codicil to the prior will,

(i) *Musto v. Sutcliffe*, 3 Phill. 104. *Warburton v. Burrows*,  
1 Add. 383. *Allen v. Manning*, 2 Add. 490.

would be a distinct will of the personal estate, and independent of the will of the real estate.

II. Nuncupative wills are surrounded by so many regulations, that their validity can only be insured by the exercise of extreme care and caution. The making of nuncupative wills should, if possible, be avoided in every case; but sudden and fatal sickness may reduce a dying man to the necessity of adopting this peculiar mode of disposing of his property. In such cases of emergency the necessary regulations must be scrupulously observed.

It is enacted by the statute of frauds, 1st. that no nuncupative will shall be good, where the estate thereby bequeathed, shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses at the least, that were present at the making thereof; (and by statute 4 Anne, c. 16, sec. 14, such witnesses as are admissible on trials at law, are declared to be good witnesses to prove any nuncupative will); nor unless it be proved, that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she had

been resident for the space of ten days or more next before the making of such will, except where such person was surprised, or taken sick being from his own home, and died before he returned to the place of his or her dwelling. 2nd. That, after six months passed after the speaking of the pretended testamentary words, no testimony should be received, to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing, within six days after the making of the said will. 3rd. That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any Court, till fourteen days at the least after the decease of the testator be fully expired ; nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same if they please. 4th. That no will in writing concerning any goods or chattels, or personal estate, shall be repealed ; nor shall any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be, in the lifetime of the testator, committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least. But the act declares, that any soldier, being in

actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of the act.

The words of the statute are very strong and particular, and are always strictly construed, because the opportunity and temptation to commit fraud may be considerable, and detection be difficult. Consequently the absence of due proof of strict compliance with any one of the restrictions is fatal at once in a case of this species.

1st. The preliminary and principal requisite is the *rogatio testium*, the calling upon the persons present to bear witness to the act. The deceased himself is required by the statute to bid the persons present to bear witness, and nothing short of an express *rogatio testium* is sufficient. The Court is tied down by the statute, and will withhold the probate, where it does not appear that the deceased, before the testamentary words were spoken, did expressly bid the persons present, or some of them, to bear witness that the words he pronounced were his will (*k*).

It is important to enquire what is deemed a sufficient *rogatio testium*, within the statute.

(*k*) *Parsons v. Miller*, 3 Phill. 196. *Bennett v. Jackson*, Ib. 190.

Where the deceased used the words, "listen all of you what I, A. B., do say," the Court was by no means prepared to say that they were not sufficient (*l*); but the point was not decided, as the question respecting the validity of the will was decided upon other grounds. A man ill in bed of the sickness of which on the next day he died, was asked by a person present if he had made his will? He said "No." The same person observed a verbal will would be sufficient, as there were a sufficient number of witnesses present; and the sick man replied, "he knew it would," and then uttered the words disposing of his property. The Court said, it did not appear that the deceased addressed himself in any such manner as was required by the statute before the words were spoken. The will was not admitted to probate (*m*). A paper propounded as a nuncupative will was rejected, where the deceased was asked by a person present, if some one to make his will should be sent for; he said, he was too ill to make a will: he was asked, if there was any thing he would have done, and was assured it should be done: the deceased then began at once repeating the words pleaded, but without desiring the persons present to bear witness.

(*l*) *Lemann v. Bonsall*, 1 Add. 389.

(*m*) *Darnbrook and Sawyer v. Silversides*, cited 2 Phill. 196.

It was then proposed to call up another person who might hear and be a witness. The deceased answered, “*do.*” This was the only word of the deceased which expressed any wish on the subject. The other person was called, and then the friend said, “Now repeat before A. B., who will be a witness.” This (observed the Court) is a *rogatio testium*, but not by the testator, and accordingly probate was refused (*n.*).

No particular words are required by the statute, but it is expressly declared that it must be proved that the testator, at the time of pronouncing the will, did bid the persons present, or some of them, bear witness that such was his will, or to that effect. And as the oaths of three witnesses (at the least) present at the making of the will are required to prove the same, it follows, that in the presence of such three witnesses the testator must pronounce the *rogatio testium*, as well as the words of the will. It is presumed that the following words will be a sufficient *rogatio testium*: “I, A. B., require you C. D., E. F., and G. H. to bear witness that the words I now intend to utter are my last will.” Let the testator then proceed with his will, “I give to, &c.”

2d. The statute requires, that a nuncupative will be made during the last sickness of the

(n) *Parsons v. Miller*, 1797, 2 Phill. 194.

deceased. Consequently, if the testator recover from his sickness, a nuncupative will cannot be valid, as he would in such case have an opportunity of making a written will.

The other requisites prescribed by the statute do not seem to require any comment.

It is scarcely necessary to observe that personal estate only can pass by a nuncupative will.

If a man dispose of part only of his property by a written testament, he may dispose of the residue by a nuncupative codicil. So if a residuary legatee named by a will in writing die in the life of the testator, whereby the devise as to that is void, he may dispose of it by a nuncupative will, if he does not alter his executor or any thing else.

The formal part of a nuncupative will may be expressed as follows—

A. B., of &c. did in his last sickness, on the      day of      [at his dwelling house (or), at      , where he hath been resident for the space of ten days next before the said day of      (or), the said A. B. being surprised or taken sick being from his own home, (and having died before he returned to the place of his dwelling) bid us, C. D. of &c. E. F. of &c. and G. H. of &c. (we being then in the presence of the said A. B.) to bear witness, that the words which he did then and there pro-

nounce in our presence, were his last will and testament; which words were as follows, that is to say, "I, A. B., give &c. [the exact words uttered by the testator must be recorded]. In testimony whereof, we, the said C. D., E. F., and G. H. have hereunto subscribed our names, and do declare, that the said testamentary words were committed to writing on the              day of

(Signed)	C. D.
	E. F.
	G. H.

III. Property may also pass without writing, as a *donatio mortis causa*. A man *in extremis*, or surprised with sickness, without an opportunity of making his will, may give, with his own hand, his goods to his friends about him; such gifts are called *donationes causa mortis*. But many conditions accompany these donations. If the donor recover, if he repent his gift, if the donee die before him, the property will revert. A *donatio mortis causa* is therefore a conditional gift, and the property is not absolutely vested till after the death of the donor (o).

The doctrine on the subject of *donationes mortis causa*, according to the civil and Roman law and the law of England, has been discussed by Lord

(o) *Hedges v. Hedges*, Prec. Chan. 269. *Walter v. Hodge*, 2 Swanst. 92.

Hardwicke, in *Ward v. Turner*, 2 Ves. 431. From the authority of Swinburn and the several cases on the subject, Lord Hardwicke held that by the civil law, as received and allowed in England, and consequently by the law of England, tradition or delivery is necessary to make a good *donatio mortis causa*. It is impossible to make such a complete donation, as a general bequest of all one's personal estate, or of a residue, without some proof of delivery; for that would be the same as a nuncupative will. Indeed, the greater part of the cases which have been decided on the validity of this gift, have turned upon the question of sufficient delivery. Thus in *Ward v. Turner*, where receipts for South Sea Annuities were given to a person, with this declaration, "I give you these papers, which are receipts for South Sea Annuities, and will serve you after I am dead;" it was held that the delivery of these receipts was not a valid gift of the stock. Lord Hardwicke said, the receipts amount only to so much waste paper, for if one purchase stock or annuities, of what avail are they after acceptance of the stock? it is true, they are of some avail as to the identity of the person coming to receive, but after that is over they are nothing but waste paper, and are seldom taken care of afterwards. Therefore, it would be most dangerous to allow a *donatio mortis causa* from parol proof of delivery of

such receipts. And if these annuities are called *choses en action*, there is less reason to allow of it in this case than in that of any other *choses en action*, because stocks and annuities are capable of a transfer of the legal property by act of parliament, which may be done easily. Consequently such a gift is merely legatory, and amounts to a nuncupative will, and its allowance as a *donatio mortis causa*, would introduce a greater breach of that law than ever was yet made, for if the necessity of delivery of the thing given is removed, it remains merely nuncupative. But it may be said, that it is impossible to make a *donatio mortis causa* of stock or annuities, because in their nature they are not capable of actual delivery. His lordship declared there was no harm in this, because so much of the personal estate of the kingdom subsists in stock and funds, and all the anxious provisions of the statute of frauds would signify nothing, if donations of stock, attended only by delivery of the paper, should be allowed.

But the delivery of the key of a warehouse, where bulky goods are kept, or of cellars where wines are deposited, or of a key of a trunk, has been allowed as a valid delivery of possession of such goods and property; because it is the way of coming at the possession, or to make use of the things, and therefore the keys are not

symbols, for a symbol alone would not do. A bond is the proper subject of this donation, and the equitable interest will pass upon the death of the intestate, especially considering how far the Courts have gone in assignment of *choses en action*. If a bill of sale of a personal chattel, bought by an intestate, be taken in the name of a third person in trust for him, (the legal property being in the trustee, and only the equitable interest in the *cestuy que trust*), the delivery of the bill of sale by the *cestuy que trust* will be a valid gift *causa mortis*, as to the equitable property (p). The donee of a bond, where the donor died two days after the gift, was declared to be entitled, and at liberty to sue in the names of the executors on indemnifying them (q). But the case of a bond is to be considered as an exception, and not as a rule; and where a bond is accompanied by a mortgage deed, the delivery of the bond cannot be considered as drawing after it the mortgage, though a collateral security for the same debt; and therefore, the delivering of a bond, where there is also a mortgage, is not to be considered as a gift completed (r). Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio*

(p) *Snellgrove v. Baily*, 3 Atk. 213.

(q) *Gardner v. Parker*, 3 Mad. 184.

(r) *Duffield v. Elwes*, 1 Sim. & Stuart, 239.

*mortis causa*, because it will not prevent the property from vesting in the executors; and as a Court of Equity will not *inter vivos* compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator. The delivery of a mortgage deed cannot pass the property *inter vivos*: first, because the action for the money must still be in the name of the donor; and secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which can only pass by the deed of the mortgagee; and no Court would compel the donor to complete the gift by executing such a deed. A check on a banker, payable to "self or bearer," or a promissory note, being absolute and immediate, are not valid *donationes mortis causa* (s).

If too much facility were afforded to *donationes mortis causa*, a door would be opened to elude the statute. Lord Hardwicke seemed to think one witness was not sufficient; and he said, if a case depended at all on the question of fact, he should not venture to determine it, but would send it to an issue. The authorities appear not to require a plurality of witnesses, but only that the proof be satisfactory. All the *minutiae* of such transactions are to be ex-

amined, the effect depends upon each word, and each minute act, and, as already observed, upon the question of sufficient delivery (*t*).

(*t*) *Walter v. Hodge*, 2 Swanst. 92.

A

# General Precedent

FOR

## W I L L S.



I, A. B. of &c. do hereby revoke all wills, codicils, and other testamentary dispositions made by me at any time or times heretofore, and do publish and declare this to be my last will and testament (1).

(1) By statute 34 & 35 Hen. 8, c. 5, s. 14, it is enacted, that Testamentary incapacity.  
“wills or testaments made of any manors, lands, tenements, or city.  
other hereditaments by any woman covert, or person within the  
age of twenty-one years, idiot, or by any person of non-sane  
memory, shall not be taken to be good or effectual in the law.”

1. As to disposition by will by a feme covert, see note “*Feme Covert.*”.

2. In an infant there is an absolute disability to dispose of his inheritance, and it has never been held, that he could exercise even a power over real estates, unless it be a power simply collateral. *Hearle v. Greenbank*, 3 Atk. 703. 1 Ves. 304. If, however, there be a local custom, that lands and tenements within a certain district, shall be devisable by all persons of the age of fifteen years or upwards, a devise of such lands by an infant of that age will be good.

An infant may, by his last will and testament in writing, executed in the presence of two or more credible witnesses, dispose

of the guardianship of his child, by virtue of the statute 12 Cha. 2, c. 24, s. 8, and it has been contended, that such disposition will draw after it the profits of the land, as incident to the guardianship. *Bedell v. Constable*, Vaugh. 177. But though a testamentary guardian by statute, till an infant be twenty-one years of age, and a guardian in socage are the same, and whatever interest the latter may have in lands till the infant be fourteen, the guardian by statute has generally speaking the same until he is twenty-one, yet such testamentary guardian cannot make a lease of the infant's lands, but the lease would be absolutely void. *Roe, dem. Parry, v. Hodgson*, 2 Wils. 135.

An infant may before twenty-one dispose of personal estate by testament. But it is controverted at what age this testamentary power begins to attach, as it is neither derived from nor regulated by any statute. The opinion on the subject most to be relied on, distinguishes between males and females; making the testamentary power, to commence in the former at fourteen, and in the latter at twelve. Harg. note Co. Litt. 89 b.

It may not be improper to notice, that if a child be born on the third September, and on the second of September twenty-one years after, he make his will, it will be good, because the law will not make a fraction of a day; and consequently, being of the age of twenty-one years, he might devise his lands. Raymond, 480. 1096. *Roe, dem. Wrangham, v. Hersey*, 3 Wils. 274.

3. Other disabilities expressly mentioned in the statute are idiocy and non-sane memory. But if a person in his sound mind should make a will, and afterwards become insane, the will would not be revoked nor affected by such subsequent insanity. 4 Co. 61. A testator is presumed to be of sound mind till the contrary be proved. The *onus probandi* therefore lies on the party disputing the will on the ground of such incapacity.

A lunatic is not wholly and necessarily incapacitated from making a legal will. Such will may be made during a lucid interval. It is sufficient if the evidence adduced in support of the will shall establish that the party afflicted has intermissions, and that there was an intermission of the disorder at the time of the act. But the order of proof and presumption is thereby inverted; for where habitual insanity is established, there the

party who would take advantage of the act done during an interval of reason, must prove it. In all these cases, the question is whether a lucid interval did exist in which the act was done: and if it can be proved that such act was rationally and sensibly done, and if there does not appear that there existed any delusion or gross inconsistency in the disposal of the property, the whole case is proved, and nothing is left to presumption to shew the lucid interval. But it must be shewn, that the act was done without any assistance from another person, and that the lucid interval was of sufficient length to do the act intended. But the consistency and propriety of the act will also be taken into consideration, for the purpose of shewing that a lucid interval really did exist; and such internal evidence will generally have more weight with the Court than the mere opinion of witnesses. These principles have been fully established in the important case of *Cartwright v. Cartwright*, 1 Phill. 90. The testatrix was early afflicted with the disorder of her mind: and in general her habit and condition of body, and her manner, for several months before the date of the will, were that of a person afflicted with many of the worst symptoms of that dreadful disorder; which also continued after the making of the will. The lady was for some time debarred the use of books, pens, ink, and paper, from the fear that reading or writing might further discompose her mind. Some time prior to the writing of the will she grew very anxious to be allowed the means of writing. The physician in attendance endeavoured to dissuade her, saying, that he must appear as a witness against whatever she wrote. But, as she continued importunate in such desire, the physician, in order to quiet her mind, consented that she should have the materials for writing, at the same time observing to the persons in attendance, that it did not signify what she might write, as she could not make a proper use of them. Pens, ink, and paper, were carried to her; and her hands, which had been for some time before kept constantly tied, were set at liberty; and she sat down at a bureau, and desired the persons present to leave her alone while she wrote. They retired into an adjoining room, whence they watched all the motions of the deceased. The lady

appeared to have been dissatisfied with the various attempts which she then made to write her will, as she tore, from time to time, several pieces of paper on which she had written. Having been occupied between one and two hours, she called for a candle to seal the paper. She was permitted to use the candle; and although the attendants were wont to be cautious not to trust her with a candle, she neither did nor attempted any harm with it. The will was written by the lady herself without the assistance of any other person: she accomplished her purpose, and completed the act she had in contemplation; and in a subsequent conversation with a friend about her will, she recognized it, and, in so doing, observed, there was no need of witnesses, as the estate was all personal; and the will, she said, was all in her own hand-writing. She then delivered the will to her friend, whom she desired and pressed to receive it. The lady not only formed her plan, but pursued and carried it into execution with propriety, and without assistance; and though the Court observed that *such circumstance would have been alone sufficient to establish the will, yet the act was further affirmed by its recognition and delivery.* The temporary sanity of the testatrix was evinced by the propriety with which the will was made; it shewed that she had a full and complete capacity to understand the state of her affairs, and to consider and estimate the relative and just claims of her relations.

In the case of *Clarke v. Lear & Scarwell*, cited 1 Phill. 119, a lunatic who had been disordered in his mind for a length of time, made a codicil to his will in a very regular and systematic form; but it was rejected by the Ecclesiastical Court, because *it was evident from the attendant circumstances that it was made under a delusion.* Whilst on the sea coast for the benefit of bathing, he saw a young woman at the house where he boarded, whom he wished to marry, though he had no prior knowledge of her. He was brought home in a state of insanity, and afterwards wrote the paper by way of codicil to his will, by which he gave a legacy to the same young woman, who was scarcely known to the deceased, and who had no just claim upon his bounty, but of whom he had conceived a favourable impression when he was in a state of derangement.

In *Coglan v. Coglan*, also cited 1 Phil. 120, the will of a person who was afflicted with a distemper of the mind to a very great degree was admitted to probate under the following circumstances. The deceased was visited by a gentleman who was known to him, and with whom he entered into a rational conversation respecting his family; and exactly as he had told this gentleman, he gave directions to an attorney to make his will, which was for the benefit of his family, except his granddaughter, to whom (she having had a fortune left to her) he had frequently declared he would bequeath only 100*l.*, as she was fully provided for. The will was drawn; and, when it was first brought to him, he was in some degree recovered; it was then read over to him, and he declined executing it at such time; but he did execute it afterwards; and it appeared to be according to the intent and desire of the testator, who had an interval to express himself. The attorney said he gave him instructions in a very composed manner: and upon that ground the will was pronounced for, *there being no disorder at the time, and the will being consistent with his intentions when of sound mind.*

The law recognizes acts done during a lucid interval; but it is scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in ascertaining the existence of such an interval; and persons who are called upon to make a will under such unfortunate circumstances should exercise the utmost vigilance, and look into every circumstance, however minute, with the greatest jealousy and suspicion.

Partial insanity, or insanity on a particular point, may invalidate a will which proceeds from the effect of such partial insanity, and which may fairly be presumed to have been made under its direct and immediate operation. But such fact is extremely difficult of proof, as direct mental perversion and actual insanity, with respect to the object of such delusion, must be satisfactorily established. *Dew v. Clark & Clark*, 1 Add. 279. *Greenwood's Case*, cited *Ib.*

A person deprived of his faculties by extreme old age, or by Other disintoxication, while the paroxysm endures, is not of testamentary abilities. capacity. Prisoners, captives, and the like, are not absolutely

intestable; but the law leaves it to the discretion of the Court to judge upon the consideration of their particular circumstances of duresse, whether or not such persons could be supposed to have *liberum animum testandi.* 2 Blac. Com. c. 32.

Persons incapable of making testaments on account of their criminal conduct, are, in the first place, all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Nor is the will of a *felo de se* of goods, debts, and chattels, real and personal, valid; for they are forfeited to the king by the act and manner of his death; but the land shall not escheat, nor his wife forfeit her dower, nor the blood be corrupted between him and his heirs; therefore a previous devise of his lands will be sustained. Plowd. 261. Outlaws also, though it be but for debt, are incapable of making a testament, so long as the outlawry subsists; for their goods and chattels are forfeited during that time: but he who is outlawed in an action personal, may make a testament of his lands, for they are not forfeited.

Wills are not established by removal of disabilities.

A testator must be capable of devising, at the time when the will is made; therefore, a will made by a person, during the continuance of any disability, being absolutely void, the subsequent removal of the disability will not render the instrument a valid will, although such person should, in the presence of several witnesses, declare his desire, that the will made during the period of incapacity should be considered as a legal will. In order to render such an instrument valid, it must, after the removal of the disability, be re-published, with all the attendant solemnities required by law. The following observations will elucidate this principle:—If an infant make a will, and devise land during his infancy; or if a feme covert, during the life of her husband, make a will, and dispose of land; though the *covverture* and *infancy* be afterwards removed, and the husband die, or the infant come of age, yet if either of the devisors die without making a new will, or republishing the former will, such would be void because of the original disability, though they should live many years after such respective disabilities are removed; for in these cases the law does not regard the time of

II. I direct my debts, funeral and testamentary expenses, and legacies, to be paid out of my real and personal estate\*. Debts, &c. charged on real and personal estate.

the death of the testator, but the want of personal qualification at the time of disposing. So with respect to qualification in point of discretion, if a man be not in his right senses at the time of making his will, though he afterwards, and long before his death, recover the exercise of his judgment and understanding; yet, because he wanted the disposing power at the time of making his will, it is void. *Bunker v. Cook*, 11 Mod. 123. *Arthur v. Bokham*, Ib. 157. See note "Republication."

\* An adequate provision ought to be made for the payment of debts, and a general charge should (by way of caution) be made in express terms on the real estate. *Thomas v. Britnell*, 2 Ves. 313. *Williams v. Chitty*, 3 Ves. 345. As real estate is not subject to the payment of simple contract debts, unless made so by the will of the testator, if it be apprehended that the personal estate may not prove sufficient to liquidate the debts, a devise ought to be made of the real estate, or of a competent part thereof, to trustees, to be sold for the purpose of raising money to supply such deficiency; or a power of sale over the real estate, or of a competent part therof, might be given to trustees; or a term of years might be limited to trustees upon trust, to mortgage the premises comprised in the term.

Subjecting an estate to debts, without giving an absolute power to sell, does not guard the estate from being sold, if debts cannot be otherwise paid. On the other hand, directing an estate to be sold for the payment of debts, does not imply that it must be sold at all events, if the debts can be satisfied without. *Elliot v. Merriman*, 2 Atk. 41. Where estates are devised to trustees in trust, to pay debts, &c. out of the rents and profits, it is held, that by a liberal construction of the words, "rents and profits," a direction to sell or mortgage is included; and as a devise of the rents and profits will at law pass the lands, the raising by rents

and profits is the same as raising by sale. *Green v. Belchier*, 1 Atk. 505.

As to terms created for raising money for payment of debts.

Where a testator creates a trust for payment of debts, and declares the trust of that term to be by perception of rents and profits, or by leasing, or by mortgaging to raise sufficient money for the payment of his debts, this declaration restrains the trust to a payment merely out of rents and profits; but the term might be sold for the satisfaction of creditors, if it had been a trust of the rents and profits. *Ridout v. Earl of Plymouth*, 2 Atk. 105.

Creditors and legatees

Creditors will be preferred to legatees, where a testator lets in the claim of creditors by a charge on his real estate. *Kidney v. Coussmaker*, 12 Ves. 155.

General words constituting a charge of debts on real estate.

In the preamble of his will, a testator directed that his debts should be paid out of his worldly estate. The words "worldly estate" were construed to include the real as well as personal estate. *Leigh v. Earl of Warrington*, MS. Belt's Suppl. 341. S. C. reported 1 Bro. P. C. 511. This decision seems to have been founded on the plain signification of the words "worldly estate." But the desire of the Courts to do justice to creditors, and to attain satisfaction of just debts as far as possible, has led to various decisions, which there is great difficulty in reconciling. Previously to the case of *Clifford and Lewis (infra)* a rule of construction seems to have been obtained from the circumstance, whether the executor, whose office it is to discharge the debts of the testator, was also the devisee of the real estate. *Finch v. Hattersley*, cited 7 Ves. 211. In such cases a charge on the real estate was held to be made by general introductory words; such as "I direct that all my debts should be first paid and satisfied," or "imprimis I direct my debts to be paid." *Earl Godolphin v. Penneck*, 2 Ves. 272. *Thomas v. Britnell*, 2 Ves. 313. But it was still held, that under other circumstances the mere direction, that all debts should be paid, or should be paid by executors, was not of itself a charge on the real estate. *Powell v. Robins*, 7 Ves. 209. However, the Vice Chancellor appears, in the decision of the case of *Clifford v. Lewis*, 6 Mad. 33, to have extended the rules of construction. There the words were, "I will and direct that my just debts, funeral, and tes-

tamentary expenses, be paid and satisfied;" and his Honour decreed, that the real estate was charged with the payment of the debts; remarking, that, "although in the form of the expression the testator had not directed his debts to be paid in the first place, yet that he had done so in fact." It is true, that a power of sale or mortgage was in the latter case given by the testator to the executors; but such power was for a specific and limited purpose; and indeed that circumstance did not form any part of the grounds of the decree of the Vice Chancellor.

Where the introductory words of a will make the real estate liable, it shall extend as well to the copyhold as to the freehold lands. The freehold is as unnatural a fund for the payment of debts as the copyhold. *Harris v. Ingledeew*, 3 P. Wms. 96. Where personal estate was bequeathed subject to the payment of debts, funeral expenses, &c.; and the testator directed, that in case his "personal estate should not be sufficient to discharge the same, then he charged and made chargeable all his freehold estates with the payment thereof," and subject thereto, gave, devised, and bequeathed all his freehold and copyhold estates, which he had surrendered, or intended to surrender, to the use of his will, it was held that, (without reference to authorities further than as they establish the general principle, that in a doubtful case the Court inclines to the construction in favour of creditors rather than against them), the fair sense of the will, taken altogether, with the introductory clauses, was that the copyhold estate was charged. *Noel v. Weston*, 2 Ves. & Bea. 269.

In some cases a testator may wish that his personal estate should be entirely exonerated from all his debts. Care must be taken to provide an ample fund out of the real estate, otherwise the intention of the testator would be frustrated, for the personal estate would, by law, continue subject to the debts: and a testator cannot, as against his creditors, exempt the personal estate, though against his heir at law, or the devisee of his real estate, he may substitute the real in the room of the personal estate. *Walker v. Jackson*, 2 Atk. 624. In case the real estate be charged with the debts, yet the personal estate being the primary

fund out of which they must be paid, the real estate will not be liable until all the personal estate is exhausted, unless it be the manifest intention of the testator that the personal estate should be exonerated, and that the ~~real~~ estate should be alone applied to that purpose. *Bridgman v. Dove*, 3 Atk. 201. *The Duke of Lancaster v. Mayer*, 1 Bro. Ch. Ca. 454.

The mere charging an estate with the payment of debts, or creating a term for such purpose, will not alone exempt the personal estate. *Galton v. Hancock*, 2 Atk. 424. *Walker v. Jackson*, 2 Atk. 624. *Bridgman v. Dove*, 3 Atk. 202. If the real estate is expressly devised for the payment of debts, the personality will be exempted; but if the real estate be not sufficient, the personality must be applied; and if there is any residue, the executor is entitled to it. *Bicknell v. Page*, 2 Atk. 78. *Adams v. Meyrick*, Eq. Ca. Abr. 271. But on the other hand it has been held, that a charge upon the real estate, however anxiously provided, does not itself exempt the personal estate. *Tait v. Lord Northwick*, 4 Ves. 823. Where the real estate is devised to pay debts generally, or legacies generally, the personality is not exempted. But, by a direction to pay a particular debt, or a particular legacy, in contradistinction to other debts and other legacies, the personality is held to be so far exempt. *Maughan v. Mason*, 1 Ves. & Bea. 410. In *Gittins v. Steele*, 1 Swanst. 28, the Lord Chancellor observed, that the old law was, (and he regretted that it was not law still), that the personal estate could not be exempted from the payment of debts and legacies without express words, but that the rule now was, that for the purpose of collecting the intention, every part of the will must be considered. It is not necessary that the intention should be so manifest that all persons could not fail to agree with respect to it, but so as to convince the mind of the judge deciding the particular question. *Bootle v. Blundell*, 1 Meriv. 193. *Tait v. Lord Northwick*, *supra*. *Hancox v. Abbey*, 11 Ves. 186. *Barnewell v. Lord Cawdor*, 3 Mad. 453. In construing a will, conjecture must not be taken for implication; but necessary implication means not natural necessity, but so strong a probability of intention, that an intention

contrary to that which is imputed to the testator cannot be supposed. *Wilkinson v. Adam*, 1 Ves. & Bea. 466.

When it is the intention of a testator to exempt his personal estate from the payment of his debts, it is certainly desirable that such intention should be particularly expressed, in order that conjecture may not be resorted to.

At common law, the heir could retain for his own specialty debt; so a devisee under the statute must have the same right as the heir. An executor may retain his own debt, or the debt of his trustee; and therefore a devisee may retain for his own specialty debt, or the debt of his trustee; and if the devisee be also the executor of a deceased creditor, he may first retain for his own debt, and next for the debt of his testator. *Loomes v. Stotherd*, 1 Sim. & Stuart, 458: and see note "Executors."

It has never been contended that a direction to pay debts out of the personal estate of the testator, where that is the only fund, has revived debts upon which the statute of limitations has taken effect by the expiration of time, previously to the death of the testator. But a rule has been understood as prevailing, that a devise of real estate for the payment of debts would let in debts otherwise barred by the statute. This floating notion prevailed for a great length of time: and it is singular that the rule should have remained in uncertainty, till the case of *Burke v. Jones*, 2 Ves. & Bea. 275, in which Sir Thomas Plumer decided that such devise has not the effect of reviving those debts, but that they are left open to examination by all the means which the rules of law and equity admit. His Honour said, that he had given the question all possible attention; he had spared no pains in collecting every case in print, or that he could hear of, bearing upon it, he had traced the history of this supposed rule to its foundation, and had examined to the bottom the authorities on which it had been supported; and the result was, that though there are many *dicta*, there is not one case the facts of which are distinctly stated, deciding that a debt actually barred by the statute, is revived merely by virtue of this clause, either as to personal or real estate.

In the arrangement of funds for the payment of debts, it should be remembered that the personal estate is liable to discharge gage debts.

*mortgage debts*, though there be a bond or covenant for payment of the money, and that the executor is in general compellable (if there be no direction in the will to the contrary) to redeem a mortgage for the benefit of the heir, and even for the benefit of a devisee. *Cope v. Cope*, 2 Salk. 449. *Long v. King*, 3 P. Wms. 358. *Galton v. Hancock*, 2 Atk. 430, and the cases there cited. The ground on which these decisions are founded is, that the mortgage debt is considered as the personal debt of the testator; that his personal estate has been proportionably increased by the mortgage money, and that the land is only regarded as a pledge or security for the money.

As to bond debts.

If a testator, indebted *by bond*, devise part of his estate from the heir, and permit other part of the estate to descend to the heir, the lands descended to the heir must be applied to pay the debts by specialty, before the lands can be charged which are specifically devised. *Chaplin v. Chaplin*, 2 P. Wms. 367. *Powis v. Corbett*, 3 Atk. 555. A bond of the ancestor, wherein the heir is expressly bound, may, by the suit of the obligee, be made a lien from the ancestor's death upon the land descended to the heir. The obligation becomes indeed the debt of the heir in respect of the assets which he has in his own right, and he is liable according to the value of the land descended. Such lands are called assets by descent, but as soon as the heir has paid his ancestor's debts to the value of the land descended, he shall hold the land discharged. *Buckley v. Nightingale*, 1 Str. 665.

Liability of the heir and of a devisee to the payment of debts.

Where a devise to the heir makes an alteration in the limitation of the estate from that which the law gives by descent, the heir will take by purchase; but where the devise conveys the same estate as the law would make by descent, although it is charged with incumbrances, as an annuity or rent-charge for instance, yet the heir will take by descent. *Emerson v. Inchbird*, 1 Raym. 728. *Plunket v. Penson*, 2 Atk. 292. *Scott v. Scott*, Ambl. 383. *Swatle v. Burton*, 15 Ves. 371. See note, "Rule in Shelly's case." If the heir be liable to pay the debts of his ancestor in regard of lands descending to him, and shall alien the same before action brought, he shall be answerable for such debts to the value of the land so sold by him. Stat. 8 & 4 Will. and

Mary, c. 14. By the last mentioned statute a devisee is also made liable in the same manner as the heir, if he alien the lands devised before action brought.

Lands which come to the heir by purchase shall not be assets. What ~~es-~~  
At common law an estate *pur autre vie*, limited to the ancestor and ~~ates~~  
his heirs, is not assets in the hands of the heir who takes as special  
occupant. Co. Litt. 41 b. 374 b. But an estate *pur autre vic* (if  
not devised) is made chargeable by statute in the hands of the heir,  
as assets by descent, if it shall come to him by reason of special  
occupancy; and if there be no special occupant thereof, it shall  
go to the executors or administrators of the party, and shall be  
assets in their hands. 29 Car. 2, c. 3, s. 12.

The statute before alluded to, 3 and 4 Will. and Mary, c. 14, called the statute against fraudulent devises, enacts, that all devises of real estates shall be void against creditors, by bond or other specialties, except devises for payment of debts or of children's portions, pursuant to a marriage settlement. And the creditors are empowered to recover their debts against the heir at law and devisees under the will jointly. In the case of *Kynaston v. Clarke*, 2 Atk. 204, the question arose upon the statute whether a reversion in fee then come into possession after the estate tail spent, ought to be considered as assets for the payment of the bond debts of the father, (who had been seised in fee in possession, and who afterwards created the limitations, the reversion in fee being limited to himself), or whether it was prevented being so by the devise of the heir, who had died without issue, whereby the estate tail was spent. It was decided that the estate was within the words of the statute, and should be liable to pay those debts, and by circuitry the simple contract creditors were to stand in the place of satisfied bonds. A reversion is assets only for the payment of the bond debts of the ancestor from whom the lands immediately descended. 2 Saund. 8 n.

Provision for payment of debts relates to the time of the death Provision  
of the testator, and all the debts which a testator contracts during his whole life will be a charge. Where the words of a will were fers to the  
“all the debts which I have contracted,” the court said “have time of tes-  
tator’s de-  
contracted” must be construed “shall contract,” in order to make cease.

more honest provision for the payment of debts. *Bridgman v. Dove, supra.* *Brudenell v. Boughton*, 2 Atk. 273.

**As to mar-  
shalling  
assets.**

The rule for marshalling assets was stated as follows by Lord Hardwicke, in the case of *Hanby v. Roberts*, Ambl. 127: "if there are debts by specialty and legacies, and no devise of the real estate, but it descends; if the creditors exhaust the personal estate, the legatees may stand in their place and come upon the real estate—this is against an heir at law. It is as clear if one devises real estate, and gives general pecuniary legacies not charged upon that real estate, and dies leaving specialty debts, and the specialty creditors exhaust the personal estate, the legatees shall not stand in their place and come on the realty, because it was the intention of the testator that the devisee should have the real estate, as well as the legatees be paid. Therefore, if one has only personal estate, and gives specific as well as general legacies; if the creditors exhaust the general assets, yet the general legatees shall not stand in their place and come upon the specific legacies. But if one having land and personal estate makes his will, being indebted by specialty, and he gives specific legacies, and then gives the rest and residue of his real and personal estate; if the creditors exhaust the personality, the legatees may stand in their place, and come upon the residuary devisee. *Galton v. Hancock*, 2 Atk. 438. *Lanoy v. Duke and Duchess of Athol*, 2 Atk. 444.

Where a creditor has two funds, real and personal assets, and another creditor has only one, it is an invariable rule that the creditor who has two funds shall take his satisfaction out of that fund upon which the other creditor has no lien. *Ib.*

**Real estate  
of a trader  
may be ad-  
ministered  
in Equity.**

Formerly, by the policy of the law, the real estate of a deceased debtor was not subject to the payment of simple contract debts; but now the real estate of a testator, who was at the time of his death a trader within the bankrupt laws, if not charged by his will with the payment of debts, may be administered in equity for the payment of specialty and simple contract debts, in pursuance of the statute 47 Geo. 3, st. 2, c. 74. But the law remains as before the act, unless the deceased was a trader *at the time of his death*.

Where a testator had discontinued trading two years previously to his death, the provisions of the statute were held not to apply

III. I charge all my real and personal estate, *Ibid.*  
 of what nature or kind soever, with the pay-  
 ment of all my debts, funeral expenses, and  
 legacies, as well such as I shall hereby give, as and also le-  
 also such other legacies and annuities as I may <sup>gacies, &c.</sup> given by co-  
 hereafter give by any codicil or codicils to this <sup>dicil.</sup>  
 my will\*.

to his estate. It has been said that this construction will enable a man labouring under a mortal disease to quit his trade, and thus exonerate his real estate. But in such case, it would be difficult to avoid an imputation of fraud, which would frustrate his purpose. However, if a man should happen to die the day after he has *bond fide* quitted trade, the statute does not apply to his estate. *Hitchon v. Bennett*, 4 Mad. 180. *Keene v. Riley*, 3 Mer. 436.

\* It is impossible for a testator to ascertain what debts As to he may owe at the time of his death; and it is difficult to ascer- charges tain, when he is making his formal will, what legacies he may created by think fit, or his fortune may enable him to give. The Court of duly execut- Chancery has therefore said, that when he has, by a will duly ex- ed. ecuted, charged debts and legacies, it is only necessary to shew that there is a debt, or that there is a legacy, in order to constitute a charge; for the moment that character is shewn to belong to the de- mand, it is shewn that it is already charged upon the estate. Then an unattested instrument is itself perfectly competent to give a legacy, and when given it is predicated that it is a legacy, and then the charge immediately attaches by virtue of the executed will. *Rose v. Cunningham*, 12 Ves. 29. It was observed by Lord Lough-borough, in *Habergham v. Vincent*, 2 Ves. junr. 231, that the stat. of frauds does not prevent a man from creating by will a fluctuat- ing charge upon real estate in aid of personality. Thus if a man charges his lands, by his will duly executed, with all his debts and legacies, the legacies given by a codicil, though not duly executed, will be a charge upon the real estate, for the real estate was well

Bequest of  
personalty  
to trustees.

IV. I give and bequeath to [trustees], their executors, administrators, and assigns, all my personal estate whatsoever, and of what nature or kind soever, (not herein before specifically disposed of,) Upon trust, that they the said [trustees] and the survivor of them, and the executors, administrators, and assigns of such survivor do and shall with all convenient speed after my decease, sell, dispose of, and convert

charged by the will with the debts and legacies. *Hannis v. Packer*, Ambl. 556. *Brudenell v. Boughton*, 2 Atk. 273. But if a testator says, he does not now determine that all annuities and legacies which he shall hereafter give shall be charges, but only that if at some future period he shall think proper to declare legacies and annuities to be charges upon the real estate, such would be only an attempt, through the medium of an unattested instrument, to charge real estate, and therefore is illegal. *Rose v. Cunningham*, *supra*. *Smart v. Prujean*, 6 Ves. 560.

Although it is therefore settled that legacies given by an unattested paper will be included in a charge of legacies on real estate, made by a will attested by three witnesses, yet the decision has been met at least with this symptom of disapprobation, that it is remarked as a solitary case.

If by a will duly attested the devisor directs an estate to be sold, though he could have exhausted that fund by legacies, yet he cannot by a codicil unattested give away any part of it. *Wilkinson v. Adam*, 1 Ves. & Bea. 446.

Where a power to charge estates is executed by a will, but is afterwards discharged, and a similar power reserved over other estates; if the first power be executed by the will, a subsequent codicil republishing the will cannot be an execution of the power, because the will speaks only of the first power, which was absolutely gone. *Holmes v. Coghill*, 7 Ves. 499.

into money so much thereof as shall be in its nature saleable, and collect, get in, and receive the residue thereof; and I do hereby declare, &c.

V. And I direct the said [trustees] and the survivor of them, or the executors, administrators, or assigns of such survivor, with and out of the said monies to pay, satisfy, and discharge all my just debts, funeral, and testamentary expenses, and legacies, and also the legacies or other charges, which I may give by any codicil to this my will, or by any testamentary writing whatsoever, and to lay out and invest the residue of the said monies, after answering the purposes aforesaid, in their or his names or name, in the parliamentary stocks, or public funds of Great Britain, or at interest on government or real securities in England or Wales. And from time to time to alter, vary and transfer the herein-before mentioned trust monies, stocks, funds, and securities, for or into other stocks, funds, or securities of the like nature, when and so often as they or he shall think fit. And I do hereby direct that every such calling in, sale, alteration, variation, or transfer, shall [during the life of my said wife, be made with her consent in writing, and after her decease] be made at the discretion and of the proper authority of the said [trustees], or the survi-

To pay  
debts out of  
personality.

vor of them, or the executors, administrators, or assigns of such survivor; and I do hereby declare that the said [*trustees*] and the survivor of them, and the executors, administrators, or assigns of such survivor, shall stand and be possessed of and interested in the said trust monies, stocks, funds, and securities, and the interests, dividends, and annual produce thereof, respectively, upon, and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoies, agreements, and declarations herein-after expressed and declar-ed of and concerning the same, (that is to say) &c.

Ibid. VI. I direct that all the debts which I shall owe at the time of my decease, and all the legacies given by this my will, or which I shall give by any codicil to the same, or by any testamentary paper signed by me, or in my own hand-writing, and whether witnessed or not, shall be paid out of my personal estate, not specifically bequeathed; and I charge the deficiency on my real estate. And I exempt my personal estate from the payment of the annuities given by this my will, or which I shall give by any codicil or testamentary paper whatsoever. And I charge all the said annuities, whether the codicil or writing by which I shall give the same be witnessed or not, on my real estate. And

unless I shall expressly direct the contrary,  
I direct the same to be paid quarterly.

VII. I direct, in case my personal estate Ibid.  
shall prove insufficient for the payment of my  
debts, funeral and testamentary expenses, and  
legacies, that the same shall be a charge upon  
my real estate. I give and bequeath to [*trustees* and gives  
*tees*], their executors, administrators, and as- personal es-  
signs, all my personal estate whatsoever, and tees;  
of what nature or kind soever, (not herein-be-  
fore specifically disposed of) upon trust, that  
they the said [*trustees*] and the survivor of  
them, and the executors, administrators, and  
assigns of such survivor, do and shall, with all  
convenient speed after my decease, by, with, to pay debts,  
and out of the same, pay all debts which I shall  
owe at the time of my decease, and my funeral  
expenses, and the costs and charges of proving  
and establishing this my will, and the carrying  
the same into execution, and the legacies here-  
inafter bequeathed by me. And the surplus Bequest of  
and residue of my personal estate and effects I residue.  
give and bequeath to &c.

VIII. I direct, in case my personal estate Ibid.  
shall prove insufficient for the payment of my  
debts, funeral and testamentary expenses, and  
legacies, that the same shall be a charge upon

Bequest of  
money se-  
cured by  
policy, my real estate. Whereas by a policy of as-  
surance, bearing date the day of  
the Society of the Norwich Union Life As-  
surance Office did assure to me the sum of  
(£ ) to be paid to my executors, adminis-  
trators, or assigns, after my decease. Now I  
do hereby give and bequeath the said sum of  
(£ ) And also all other my monies and per-  
sonal estate and effects whatsoever and where-  
soever, unto [trustees], their executors, ad-  
ministrators, and assigns, Upon trust, that they  
the said [trustees], and the survivor of them,  
and the executors, administrators, and assigns  
of such survivor, Do and shall out of the same  
levy and raise money sufficient to pay and sa-  
tisfy all my just debts, and funeral and testa-  
mentary expenses; And do and shall apply the  
money which shall be so raised in payment and  
satisfaction of such debts, funeral and testa-  
mentary expenses accordingly: And do and  
shall apply and dispose of the residue of the  
said monies, estate, and effects, as follows, that  
is to say:

Bequest of  
money aris-  
ing from cer-  
tain sales of  
estates,

IX. I do hereby give and bequeath all such  
of the monies to arise from the sale of the es-  
tates, directed to be sold by virtue of the set-  
tlement made on my marriage with my present  
wife, as I shall become entitled to in the event

of my surviving my said wife, and of failure of issue of our said marriage, as herein-before is mentioned: And also all other my monies and personal estate and effects whatsoever and wheresoever, unto [trustees], their executors, administrators, and assigns; Upon trust, that to trustees, they the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, out of the same, levy and raise money sufficient to pay and satisfy all my just debts, and funeral and testamentary expenses: And do and shall apply the money which shall be so raised, in payment and satisfaction of such debts, funeral and testamentary expenses accordingly: And do and shall apply and dispose of the residue of the said monies, estate, and effects, as follows, that is to say:

X. And as to all arrears of rent which shall be due at the time of my decease, and all the rest and residue of my personal estate and effects whatsoever and wheresoever, I do hereby direct my executors hereinafter named, with all convenient speed after my decease, to sell, dispose of, and convert into money, so much thereof as shall be in its nature saleable; and to collect, get in, and receive the residue thereof, and with and out of the monies arising from the same, to pay, satisfy, and discharge all my

Direction to  
executors  
to collect  
arrears of  
rent and per-  
sonalty.

pay debts,  
&c.

and apply  
residue.

and thereout  
pay debts,  
&c.

just debts, funeral and testamentary expenses, and the several legacies given by this my will, or which I shall give by any codicil to this my will, or by any testamentary writing whatsoever: And to pay resi-  
due to trus-  
tees, to pay over to the said [*trustees*] or the survivor of them, or the executors, administrators or assigns of such survivor, so much of the said monies as shall remain after answering the purposes aforesaid: And I do hereby direct that the said trustees, or the survivor of them, or the executors, administrators, or assigns of such to be laid out survivor, do and shall lay out and invest the monies to be so paid to them or him as aforesaid, in the purchase of freehold, leasehold, or copyhold estates in England or Wales, to be with the ap-  
probation of persons in-  
terested,  
&c. approved of by some writing under the hand or hands of the person or persons who would for the time being be entitled under this my will, to the possession or to the receipt of the rents and profits thereof, in case the same were then actually purchased and settled to the uses hereinafter directed, if such person or persons be of the full age of twenty-one years; but if such person or persons respectively shall be under that age, then every such purchase shall or in case of their minor-  
ity, at the discretion of trustees. be made at the discretion of the said [*trustees*], or the survivor of them, or the executors, administrators, or assigns of such survivor: And I direct that the said [*trustees*], or the survivor of them, or the executors or administrators of

such survivor, shall settle and assure, or cause to be settled and assured, the estates so to be purchased, to the uses, upon and for the trusts, <sup>Lands to be settled to</sup> same uses, intents, and purposes, and with, under, and <sup>&c. as lands devised by</sup> devised by subject to the powers, proviso<sup>e</sup>s, and declarations expressed and declared of and concerning the manors, messuages, hereditaments, and premises hereby devised (except the trust for raising money towards payment and satisfaction of my debts, funeral and testamentary expenses, and legacies), or as near thereto as the nature and quality of the estates, and intervening accidents, will then admit of, yet so that if any of the estates so to be purchased shall be held by a lease or leases for years, the same as to the effect of transmission shall not vest absolute- ly in any person hereby made tenant in tail or in tail male, unless he or she shall attain the age of twenty-one years: (*See note "Settlement."*) And I do hereby direct, that until a proper purchase or proper purchases shall be found, in which such monies can be invested, the said [*trustees*], or the survivor of them, or the executors, administrators or assigns of such survivor, shall invest the said monies in their or his names or name in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England or Wales; and shall or may from time to time alter and vary the said stocks, funds, and securities, for other <sup>Till proper purchase, the money to be invested in funds, or on real securities.</sup> Power to change se- curities.

Interest to  
be paid to  
persons en-  
titled to  
rents.

stocks or funds of a like nature, as they or he shall think proper, and shall pay the interest and dividends of the monies to be so invested as last aforesaid, and the stocks, funds, and securities on which the same shall be invested, to the person or persons who would be entitled to the rents and profits of the estates to be purchased as aforesaid, if the same were then actually purchased and settled.

Debts, &c.  
charged on  
real and per-  
sonal estate.

Bequest of  
personality  
to trustees.

To pay  
debts, lega-  
cies,

and appro-  
priation of a  
sum charged

XI. I direct, in case my personal estate shall prove insufficient for the payment of my debts, funeral and testamentary expenses, and legacies, that the same shall be a charge upon my real estate. I give and bequeath to the said [trustees], their executors, administrators, and assigns, all my personal estate whatsoever, and of what nature or kind soever, not herein specifically disposed of; Upon trust, that they the said [trustees], and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall with all convenient speed after my decease, by, with, and out of the same, pay all debts which I shall owe at the time of my decease, and my funeral expenses, and the costs and charges of proving and establishing this my will, and the carrying the same into execution, and the legacies herein before bequeathed by me, and the appropriation which is hereby directed to be made of

sum of (£ ) now charged on my settled estates, and from which I have covenanted to discharge the same; and all the surplus and residue of my personal estate I give and bequeath to, &c.

*[If the legal estate be vested in the trustees by the previous limitations of the will, the following clause may be inserted afterwards with property:—]*

XII. And in case my personal estate not herein before specifically bequeathed shall be insufficient for the payment of my debts and legacies, I do hereby direct, that the said [trustees], and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall raise money sufficient to pay the same by sale\* or mortgage of a competent

\* There is a distinction between a devise of land *to executors* Devise of land to executors t*to sell*, and a devise that *executors shall sell* the land.

A devise of land to executors to sell, passes the interest. But a devise that the executors shall sell, mortgage, or otherwise dispose of land, or that land shall be sold, &c. by the executors, passes no estate to the executors; *Lancaster v. Thornton*, 2 Burr. 1028; consequently an authority only, or a bare naked power, is given, and the freehold will therefore descend to the heir, subject to the charges. But though the heir is in by descent, and his heirs after him, yet the executors may enter upon the land, by reason of the will. A devise of land *to be sold by the executors*, without words giving the estate to them, must be deemed to invest them with a power only, and not to give them an interest. Co. Litt. 113 a, (n). Sug. Pow. 108.

In order to give the executors authority to sell, a power of sale must either be expressly given to them, or be necessarily implied from the circumstance of the produce of the sale being directed by the will to pass through the hands of the executors in the execution of their office, as in payment of debts and legacies. A testator directed, that after the decease of tenant for life, certain real estates should be sold (not saying by whom), to the highest bidder, by public auction, and the money arising from such sale to be disposed of amongst certain illegitimate children in the will named, *first* paying unto A. B. a trifling legacy. The tenant for life and another person, were appointed executors. A sale took place during the life of the tenant for life, with the concurrence of the other executor. That executor died, after the suit to establish a specific performance of the agreement had been commenced. The court decided that there was no power of sale in the executors. *Bentham v. Wiltshire*, 4 Madd. 44. In the last cited case, the executors had nothing to do with the produce of the sale, nor any power of distribution with respect to it. The sale was moreover directed to be made *after* the death of the tenant for life, who was one of the executors. The rule therefore to be deduced from the decisions on this subject appears to be, that where the purchase money of the estates is not directed to be applied to purposes within the province of the executors, and the distribution does not fall upon them as one of their functions, the implication does not necessarily arise that the power of sale, in absence of an express authority to other persons, was conferred on the executors. In all cases, before an implication is raised, there must be an absence of express devise, for in opposition to a devise it can never be raised.

There is no case where a power of sale has been implied, because the children were minors. Under such circumstances the sale must be postponed till they come of age. If property be given to minors in fee, and a sale of it is directed by the testator without his having expressly nominated persons to effect the sale, the court is not, on that account, authorized to substitute by implication executors or trustees in their place, and to take away the power of sale from one, and give it to the other. Thus a testator by his will, very untechnically expressed, directed that his son should have all his books, besides his proper share of what property

might be left at the testator's death, and that all his children should share equally in all his property; also, that the house which the testator's family inhabited, should belong to all his children, and likewise all the furniture. The testator directed, that if any two of his children, who were above twenty-one years, should disapprove of the manner of managing his land and houses, in that case the whole land and houses, together with the furniture and contents of the cellar, should be sold within one year after such disapproval at latest. Certain persons were appointed executors, and also guardians of such of his children who were under twenty-one years of age at his death; and the testator directed, that *if there should be any difference of opinion among his executors, the majority were to decide finally what was to be done.* Several children were infants. The executors having contracted to sell the real estate of the testator, a suit was instituted by them and by the children, to compel the completion of the purchase. It was held, that on the death of the testator his real property vested in all his children, and that the fee certainly passed to them, and that the circumstance of the children being minors would not raise by implication a power of sale to the executors, although the testator had defeated his own object in directing a sale under certain circumstances, when two of the children were of age and the rest might be minors. The executors were declared to be incompetent to convey, and therefore the purchaser could not be compelled to complete his agreement. *Paton v. Randall*, 1 Jac. & W. 189.

The statute 21 Hen. 8, c. 4, (which Lord Kenyon infers from the preamble was passed rather to remove doubt than to make a new law, *Withnell v. Gartham*, 6 T. R. 388,) enacts, that where part of the executors refuse to act, a sale ~~of~~ the residue shall be as good and effectual as if all the executors had joined. But there may be danger in accepting a conveyance from one executor when his co-executor has refused to act, because the latter may have sold to another person previously to such refusal.

Although the before-mentioned statute extends strictly only to cases where executors have a power to sell, yet, being a beneficial

law, it is by construction extended to cases where the *devisees* of the estate are appointed executors, if the fund to be raised by sale be distributable by them in the character of executors. But although the devisees are made executors, if the fund when raised is not distributable by them as executors, there seems to be no reason for contending that they will take the land as executors, merely because they are also appointed by the will to such office, or that the case would be considered entitled to the relief given by the statute. *Denne dem. Bowyer v. Judge*, 11 East, 288.

Common naked authorities will not survive. Lord Coke therefore advises those who make such devises by will, to make it as certain as they can, by directing that the sale be made by the executors or the survivors, or survivor of them, or by such or so many of them as take upon them the probate of the will, or the like. Co. Litt. 113 a. The propriety of this advice will appear by consulting Dyer, 177 a. pl. 32. *Stile v. Tomson*, Dyer, 210 a. pl. 24. *Danne v. Annas and Johnson*, Dyer, 219 a. pl. 8. 1 And. 145, pl. 193. *Lovell v. Barnes, supra*. *Denne dem. Bowyer v. Judge, supra*. Mr. Sugden, in his Treatise on Powers, p. 159, after reviewing the different authorities on this point, concludes, that where a power is given to two or more by their proper names, who are not made executors, the power will not survive without express words. That where it is given to three or more generally, (as to my trustees, my sons, &c.) the authority will survive, whilst the plural number remains. That where it is given to executors without a joint exercise being directed, a surviving executor may execute it. But, that where the authority is given *nominatim*, although in the character of executors, it is doubtful whether it will survive.

A power of sale, though extinct at law, would nevertheless be enforced in equity, as the purpose for which the testator directs the money arising from the sale to be applied, is the substantial part of the devise; and the persons named to execute the power are considered as mere trustees. Co. Litt. 113 a, (n).

It may be added, that executors, though renouncing probate of the will, may exercise a power of sale. *Keates v. Burton*, 14 Ves. 434.

part of my said real estates which is not herein directed to be appropriated for the settlement, and to the uses hereinbefore mentioned, except so far as respects the sum of (£  
)

Trustees to raise deficiency by sale or mortgage of real estate.

hereby provided or bequeathed by me for the portions of my younger children, which shall be a charge upon all my real estates, in such manner as is hereinbefore expressed of and concerning the same; and I declare, that if from the difficulty of getting in my personal estate, or any other reason, my trustees shall find it necessary or expedient to resort to my said real estate for the payment of my debts and legacies, before my personal estate is exhausted; it shall be lawful for them so to do: but in that case they shall afterwards, out of my personal estate, reprise, or make good to my said real estate, what shall have been subtracted from it in consequence of such resort: And I do hereby declare, that it shall and may be lawful for the said [trustees], or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, to sign and give any receipt or receipts in writing for any sum or sums of money, which shall be advanced to them or him upon any such sale or mortgage as aforesaid, or which shall be otherwise payable to them or him, under the trusts of this my will; And that the person or persons paying the same, shall not be bound to see to the application, or

Out of personal estate money raised from real estate to be reprized.  
to purchasers and mortgagees.

be accountable for the misapplication of the same: And particularly that no person advancing money on such sale or mortgage, shall be under any obligation of ascertaining that the same is wanted for the purposes herein-before mentioned; or be in any wise affected by reason of my personal estate not having been previously got in and applied in payment of my said debts and legacies, or by his knowing that the same has not been applied\*.

Clause directing receipts of trustees to discharge purchasers.

\* A clause directing that the receipts of the trustees shall discharge purchasers or mortgagees, should always be inserted when estates are by the will directed to be sold or mortgaged; because purchasers are in some cases bound in equity to see to the application of the money. But where a testator devised lands to his children, and directed the same to be sold when the executors and trustees should see proper to dispose of it, and gave the money equally amongst his children, it was held that the testator intended that the trustees should have an immediate power of sale. Some of the children were *infants* and not capable of signing receipts, and it was therefore inferred that the testator meant to give to the trustees the power to sign receipts; such being an authority necessary for the execution of the purpose declared by him. *Sowarsby v. Lacy*, 4 Madd. 142. The same principle, in order to prevent a power of sale being rendered nugatory, was also recognized in a later case. *Lavender v. Stanton*, 6 Madd. 46. It may however be remarked, that in these cases the sales were made by the trustees in the strict performance of their duty.—It is unnecessary here to inquire how far, under any other circumstances, a purchaser would be indemnified by the exercise of such implied power.

All the trustees appointed by the will must join in the receipt, unless any of them have actually renounced or disclaimed; for a conveyance from one of the trustees to the other of all his interest,

will not enable the remaining trustee to give a sufficient discharge to a purchaser, because that part of the trust which relates to the application of the money, being a personal confidence reposed by the testator in the trustee, cannot be the subject of a conveyance from him. *Crewe v. Dicken*, 4 Ves. 97.

If there be a trust or devise for payment of debts, which are not specified or scheduled, a purchaser is not bound to see to the application of the money. And where the estate is subjected to the payment of particular legacies, and the debts are not specified, a purchaser will not be answerable for the disposition of the money, because in that case the legacies cannot be paid without the debts. *Rogers v. Skillicorne*, Ambl. 189. *Smith v. Guyon*, 1 Bro. C. C. 186. It follows of course, that if the legacies and debts are specified, a purchaser or mortgagee must see to the application of the money. *Spalding v. Shalmer*, 1 Vern. 301. *Dunch v. Kent*, 1 Vern. 260. *Cotterel v. Hampson*, 2 Vern. 5. If the money arising from the sale of an estate be directed by the will to be placed in the funds, &c. or on other securities in the names of the trustees, a purchaser need only see that the trustees do invest the purchase money according to the direction of the will.

Whenever it is incumbent on a purchaser to see to the application of money, it is desirable that he should file a bill in Chancery for completing the purchase, upon which the money will be paid into Court; and it cannot be taken out without the purchaser being made acquainted with the motion or petition for that purpose.

The demands of creditors being personal upon the executor and not a lien upon the personal property, a purchaser of chattels real, though specifically bequeathed, is not bound to see to the application of the purchase money. A specific part of the personal estate is as much liable to pay the debts of the testator as every other part of the personal estate, and must by law, in the first instance, vest in the executor, to be applied in a due course of administration, the assent of the executor to the bequest of them being also necessary. The assent of the executor gives a legal title, and an action at law will lie against the executor to recover a specific chattel, after his assent to

Direction that debts be paid out of personal estate : but if insufficient, then the debts to be

XIII. I direct my debts, funeral and testamentary expenses, and legacies, to be paid out of my personal estate. And if my personal estate shall not be sufficient to pay or answer my debts, funeral expenses, legacies, and appropriations, then I charge the said manors and

the bequest. *Doe dem. Lord Saye & Sele v. Guy*, 3 East, 120. Thus a term, though specifically devised to a particular person, may be sold by the executor for payment of debts, and the only remedy which a devisee has for recovering the value is against the executor, if there were sufficient assets to pay the debts. *Ewer v. Corbet*, 2 P. Wms. 148. *Burting v. Stonard*, 2 P. Wms. 150. *Bill v. Humble*, 2 Vern. 444. (The decision in the latter case was reversed probably on proof of fraud, but the reversal has not been since attended to). *Nugent v. Gifford*, 1 Atk. 462. A purchaser of a term under such circumstances, to be secure, must have purchased *bond fide*, and must not have received previous notice respecting the debts ; but he is not bound to commence any inquiries on the subject. The principle which governs these cases was thus explained by Lord Hardwicke.—The executor has a power to dispose of and alien the assets of the testator, and when they are aliened no creditor by law can follow them, for the demand of a creditor is only a personal demand against the executor in respect of the assets come to his hands, but no lien on the assets. The Court will indeed follow assets upon voluntary alienations, by collusion of the executors. But if the alienation is for a valuable consideration, unless fraud is proved, this Court suffers it as well as at law, and will not control it ; for a purchaser from an executor has no power of knowing the debts of the testator ; and if this Court, upon the appearance of debts afterwards, would control such purchases, no body would venture to deal with executors. A sum of money *bond fide* due, is as good and valuable a consideration as money actually paid down. *Nugent v. Gifford, supra*. The reader is also referred to Mr. Butler's note on Co. Litt. 290 b. sec. 14, *et seq.*

other hereditaments first herein-before devised, charged  
with the deficiency. And I declare my will to upon here-  
be, that it shall be lawful for the said [trustees] ditaments  
and the survivors and survivor of them, and the first devised:  
executors, administrators, and assigns of such and power  
survivor, to raise the same by sale or mortgage of to trustees  
the said last-mentioned manors and other here- same,  
ditaments, or a competent part or parts of the by sale or  
same. And for that purpose by any deed or mortgage.  
deeds, instrument or instruments in writing,  
to be by them or him sealed and delivered, and to  
be attested by two or more credible witnesses, to  
appoint the said manors and other hereditaments  
or any part or parts of the same, to such person  
or persons, for such use or uses, upon such  
trust or trusts, and in such manner, as they or  
he shall think proper for the purpose of effect-  
ing any such sale or mortgage as aforesaid.  
And I expressly declare that the person and per- Indemnity  
sons paying money to my said trustees or trustee to purchas-  
on any such purchase or mortgage as aforesaid, ers and  
shall not be bound to ascertain or inquire that mortgagees.  
the same is wanted for the purposes aforesaid,  
or any of them, or to see to the application of the  
money advanced by him or them, or be account-  
able for the misapplication of the same.

XIV. Provided always, and I do hereby if residue of declare, that if the same residue of my said personal estate and effects shall not be sufficient cient for payment of

debts, a  
charge for  
deficiency  
made on a  
specific  
fund.

to pay all my debts, I charge the same debts upon the said sum of £ , herein-before directed to be raised under the trusts of the said term of 2000 years, and in preference to any of the legacies herein-before directed to be paid out of the said sum of £ . And if the said surplus of my personal estate shall be insufficient to pay my said pecuniary legacies, I also charge the deficiency on the said sum of £ . And to be paid in preference to the sums given by me out of the same to my children, but to be postponed to the legacy given by me out of the same to my said wife. And if without resorting to the said sum of £ , any surplus of my personal estate shall remain, I give and bequeath the same unto, &c.

[*N. B. It is frequently necessary to create a term of years in the real estate of the testator for providing for the payment of debts, (see Index, "Terms for years"). The trusts of such term may be thus declared.]*

Declaration  
of trust of  
term for  
payment of  
debts.

XV. And I do hereby declare that the said manors, messuages, hereditaments, and premises, are herein-before limited to the use of the said [trustees], their executors, administrators, and assigns, for the said term of 600 years, upon the trusts, intents, and purposes hereinafter expressed and declared of and concerning the

same; that is to say, upon trust that they the said [*trustees*], or the survivor of them, or the executors, administrators, or assigns of such survivor, do and shall in the first place, by sale or mortgage, demise, or other disposition of the said manors, messuages, hereditaments, and premises, comprised in the said term of 600 years, or a competent part thereof, for the whole or any part of the said term of 600 years, or by, with, and out of the rents, issues, and profits to arise therefrom in the meantime, or by all or any of the aforesaid, or by such other ways and means as the said [*trustees*], or the survivor of them, or the executors, administrators, or assigns of such survivor shall think proper, levy and raise money sufficient for the payment and satisfaction of so much and such part of my just debts (except the mortgages to which the said manors and other hereditaments are subject) and of my funeral and testamentary expenses and legacies, as my arrears of rent and personal estate and effects not specifically bequeathed shall be insufficient to pay and satisfy: And do and shall apply the money to be so raised in payment and satisfaction of such debts, funeral and testamentary expenses, and legacies accordingly: And I do hereby declare that the receipt or receipts of the said [*trustees*], or the survivor of them, or the executors, administrators, or assigns of such

Receipts of  
trustees  
sufficient  
discharge,  
&c.

survivor, shall be a sufficient discharge or sufficient discharges for the purchase or mortgage money agreed to be paid or advanced, either by way of purchase or loan, for or upon the said hereditaments comprised in the said term of 600 years, or any part or parts thereof; and that the person or persons paying money to the said [trustees], or the survivor of them, or the executors, administrators, or assigns of such survivor, on any such purchase or mortgage as aforesaid, shall not be bound to ascertain or inquire that the same is wanted for the purposes aforesaid, or any of them, or to see to the application of the money advanced by him or them, or to be accountable for the misapplication of the same: And subject to the trusts aforesaid, upon this further trust, [see declarations of further trusts of terms, Index, "Terms for years."]

Declaration  
as to the  
order in  
which the  
different  
funds for  
payment of  
debts, &c.  
shall be ap-  
plied.

XVI. Provided always, and I do hereby declare, that my personal estate shall be considered by my said trustees as the primary fund for the payment of my debts, legacies, and funeral expenses, and the costs of proving this my will: And that the savings of the rents and profits of my freehold estates herein-before settled, accruing due during any such minority or minorities as aforesaid, and also of the leasehold premises, and the rents, issues, and profits of

the messuages and other hereditaments, hereinbefore by me directed to be sold as aforesaid, until the sale or sales thereof shall actually take place, shall be considered as the next; and that the money arising by such last-mentioned sale or sales, shall be considered as the ultimate fund for that purpose: Notwithstanding which, I leave it in the full discretion of the said [*trustees*], and the survivor of them, his heirs and assigns, to sell the said last-mentioned estates, or any part thereof, before my personal estate shall have been got in and applied as aforesaid: And I declare that any purchaser or purchasers of the said manors and other hereditaments so devised to be sold, shall not be bound to see Indemnity to purchasers, &c.

that my personal estate, or the rents and profits of my said freehold and leasehold estates, are or is previously paid and applied in payment or discharge of my said debts, funeral expenses, and legacies, or any of them.

XVII. I give, devise, and bequeath unto [*trustees*], their heirs, executors, administrators and assigns, all my freehold, leasehold, and copyhold manors, messuages, farms, lands, tenements, and hereditaments, wheresoever situate, with their rights, members, and appurtenances, To have and to hold the said manors, messuages, farms, lands, tenements, and hereditaments unto the said [*trustees*], their heirs, executors, to trustees, General devise of estates.

administrators, and assigns, according to the nature and tenure of the same premises, Upon the trusts herein-after mentioned, that is to say: Upon trust, that they the said [trustees], or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, do and shall, by sale or mortgage, demise, or other disposition of the said several estates and premises, or of a competent part or parts thereof, or by, with, and out of the rents, issues, and profits to arise therefrom in the meantime, or by all or any of the aforesaid, or by such other ways and means as to them or him shall seem meet, raise and levy such sum or sums of money as shall be sufficient to make good the deficiency of my personal estate not specifically bequeathed, in answering and satisfying my debts, legacies, annuities, and funeral and testamentary charges: And for facilitating such sale or sales, mortgage or mortgages\*, I declare and direct that the

upon trust,  
by sale or  
mortgage,  
&c.

to raise  
money to  
supply defi-  
ciency of  
personal es-  
tate in pay-  
ing debts,  
&c.

Indemnity  
to purchas-  
ers.

As to pur-  
chasers, &c.  
being dis-  
charged  
from as-  
certaining  
the neces-  
sity of sale,  
&c.

\* The insertion of the clause in the text is very material, as a purchaser or mortgagee will then be freed from the responsibility or risk otherwise attaching to him, and arising out of the execution of the trust. It has been determined, that where a power is given to trustees to sell real estate, for the purpose of raising as much money for the payment of debts and legacies as the personal estate shall be deficient in supplying, such power will not arise unless the personal estate be actually deficient; and that such deficiency being a condition precedent, it ought to be sufficiently proved, otherwise the power would not authorize a sale or mortgage as the case may be. If therefore the exercise of the power

receipt or receipts of the said [*trustees*], or the survivor of them, or the executors, administrators, or assigns of such survivor, shall be a sufficient discharge or sufficient discharges for the purchase or mortgage money agreed to be paid or advanced, either by way of purchase or loan, for or upon my said several estates and premises, or any part or parts thereof respectively; and that the person or persons paying or lending the same, his, her, or their heirs, executors, administrators, or assigns, shall not be liable to answer for any loss, misapplication, or nonapplication thereof respectively; nor liable to ascertain whether such purchase or mortgage money, or any part thereof respectively, shall or may have been wanted or required to be raised for the purposes of this my will, nor liable to ascertain or inquire whether my personal estate and effects, or any part or parts thereof, have or hath been got in and applied for the purposes of this my will. And I do hereby expressly authorize and empower the said [*trustees*] and the survivor of them, and the heirs, executors, administrators, and assigns of such survi-

can only be valid in case of a deficiency of the personal estate, it follows that a purchaser must, for his own safety, ascertain such deficiency, unless the will provides that the power shall be considered as being executed, although there be no deficiency, and that a purchaser shall not be required to ascertain whether there be such deficiency. *Dike v. Ricks*, Cro. Car. 335. *Butler's note*, Co. Litt. 290 b. sec. 14. Sug. Purch. and Vend. c. 11, sec. 1.

vor, to raise by the ways and means aforesaid such sum or sums of money as they or he may think proper, though my personal estate and effects shall not have been actually got in and applied for the purposes of this my will.

[*For the clauses vesting in trustees the real and personal estate of the testator, on which the following declaration operates, see Index, "Devise," "Bequest," in loc.]*

Trustees to apply mon-  
ey raised by receipt and conver-  
sion of per-  
sonal estate and sale of  
real estate, in payment  
of debts, &c.  
and invest  
residue

XVIII. And I do hereby declare, that the said trustees or trustee for the time being, do and shall stand and be possessed of such part of my said personal estate as shall consist of money, and of the monies to arise from such other part of my said personal estate as I have herein-before directed to be converted into money, and of the monies to arise from the sale of the premises herein-before directed to be sold; Upon trust, that they the said trustees or trustee for the time being, do and shall, with and out of the said monies, pay, satisfy, and discharge all my just debts, funeral and testamentary expenses, and the several legacies, given by this my will, and which I shall give by any codicil to this my will, or by any testamentary writing whatsoever\*. And do and shall lay

Asto invest-  
ment of mon-  
ey by  
trustees.

\* The decisions relative to the irregular investment of trust monies, apply equally to trustees and executors.

It is a general rule, that, where a trustee of stock or annuities

out and invest the residue of the said monies which shall remain after answering the purpos-

takes upon himself to transfer, it is a breach of trust, and the *cestuis que trust* is entitled to an election, either to have the individual stock or annuities restored to him, which stood in the name of the trustee, or else to have the money produced from the sale by the trustee. And if a trustee of stock sell out improperly, mistaking his power, he will be decreed to replace it immediately. If the stock be at a less price than when sold out, he must invest the surplus in the same stock to the same uses. *Harrison v. Harrison*, 2 Atk. 120. *Earl Powlet v. Herbert*, 1 Vcs. Jun. 297. In every will in which an investment of trust monies is directed, a power to change securities should therefore invariably be inserted; which power should be directed to be exercised, subject to the consent of the *cestuis que trust*, and at the discretion of the trustees, according to circumstances.

Where trustees were directed to invest trust money, (till a purchase of lands could be found,) "in government funds, or other good securities," it was declared by Lord Hardwicke, that neither held to be good securities, ties.

South Sea Stock nor Bank Stock were considered as a good security, because it depends upon the management of the governors and directors, and is subject to losses. But South Sea Annuities, and Bank Annuities are of a different consideration, the directors have nothing to do with the principal, and are only to pay the dividends and interest till such time as the Government pay off the capital; and it is not in their power to bring any loss upon the investment: and, therefore, those are only and properly good securities. The word *funds* does not alter the rule, because it must relate to such funds as are a good and undoubted security. *Trafford v. Boehm*, 3 Atk. 439.

If trustees are authorized to lay out money "upon Government or real securities, or on personal security;" the Court, in many instances, will say, they shall choose that which is best. If personal property is out upon hazardous securities, there is no doubt, that trustees would be controlled by the Court; and even their *discretion would be controlled*, if that discretion were

es aforesaid, in their or his names or name, in  
in the funds the Parliamentary Stocks or Public Funds of  
&c.

shewn to be mischievously and ruinously exercised. *De Manneville v. Crompton*, 1 Ves. & Bea. 354. An executor who was directed by the will to invest money "on Government or real securities," instead of doing so, placed the money in a banker's hands, *with other monies of his own*, he was decreed to bear the loss occasioned by the failure of the bankers. Under such circumstances, the responsibility of an executor or trustee seems to depend on the fact whether he treated the money as his own, in which case it appears he would be liable to the loss; or whether the money was invested with information of the trust, and placed to a distinct trust account, in the latter case he would appear not to be answerable for the loss. *Ex parte Belchier*, Ambl. 218. *Adams v. Claxton*, 6 Ves. 226. *Wren v. Kirton*, 11 Ves. 377. *Fletcher v. Walker*, 3 Madd. 73. *Massey v. Banner*, 4 Madd. 413.

As to personal securities.

It is an established rule that executors cannot lend money on personal security, unless authorized by the will to do so; and, where executors were empowered either to lay out the money *in the funds or on such other good security as they could procure and think safe*, Sir W. Grant was clearly of opinion that they had no power to lay out the money upon personal security; that it was like trustees to sell, who could not be justified in selling for any other price, than for the best price that could be got for the property. *Wilkes v. Steward*, Coop. 6. The reporter observes, that, in this case, the executors had, in fact, lent the money upon bond. In *Vigrass v. Binfield*, 3 Madd. 62, the Vice Chancellor considered the point as settled by the last mentioned case (Lord Northington's doctrine in *Harden v. Parsons*, 1 Lord North, Rep. 145, not having been followed), and his Honour immediately ordered the executors, who had lent the testator's money upon a promissory note, to pay the amount into Court. 1 Eden, Rep. 145.

Even where trustees are authorized to lay out the money on personal security, it is decided that they are not justified in lending it upon bond *to a trader*. *Langston v. Ollivant*, Coop. 33.

Should a testator's money be invested in personal security, the

Great Britain, or at interest on government or real securities, in England or Wales. And do <sup>and vary</sup> and shall, from time to time, alter, vary, and transpose the said trust monies so to be laid out and invested as aforesaid, for, into, or upon other stocks, funds, and securities of the like nature, at their or his discretion. And I do hereby declare, that the said trustees or trustee <sup>Trustees to</sup> for the time being shall stand and be possessed <sup>stand pos-</sup>  
<sup>sessed of</sup> and interested in the said trust monies, and trust monies,  
the stocks, funds, and securities in which the same shall be invested, and the interest, dividends, and annual produce thereof, upon and for the trusts, intents, and purposes hereinafter expressed of and concerning the same; that is <sup>upon trust,</sup> to say, upon trust, &c.

executors or trustees ought not, without great reason, to permit it to remain longer than is absolutely necessary. *Powell v. Evans*, 5 Ves. 839.

The various decisions adjudging executors to be responsible for loss incidental to an irregular appropriation of trust monies are reviewed in note "Executors."

It is the duty of trustees to afford to their *cestui que trust* accurate information of the disposition of the trust fund. Trustees may involve themselves in serious difficulty by want of the information which it is their duty to obtain. *Walker v. Symonds*, 3 Swanst. 58.

## LEGACIES.

(1).  
Legacies.

Legacies are either general and pecuniary, or specific. The same legacies may indeed be specific in one sense, and pecuniary in another; specific, as given out of a particular fund and not out of the estate at large; pecuniary, as consisting only of a definite sum of money and not amounting to a gift of the fund itself, or any aliquot part of it. *Smith v. Fitzgerald*, 3 Ves. & Bea. 2.

(2).  
What are  
specific le-  
gacies.

There are two kinds of bequests which are reckoned under the name of specific legacies; 1st. When a particular chattel is specifically described and distinguished from all other things of the same kind; 2nd. When a particular species is denoted, which the executor may satisfy by delivering something of the same kind, as a horse, &c., because the bequest is merely descriptive of the species, and not of the individual thing; but where the bequest of a particular horse, as of "my black horse" (if the testator had a black horse), or of "my horse, distinguished by such a name," the legacy would be specific, and included in the first mentioned class.

There is great nicety in limiting the bounds of specific legacies, some things are so specific as to be satisfied with nothing of the same kind; and though it is difficult to make pecuniary legacies specific, yet money itself may be made the subject of a specific legacy; as by giving the money in such a bank, &c., or a sum of money in such a bag or chest, *Bronson v. Winter*, Ambl. 57; or a sum which appeared due to the testator on the last settlement with his partner, if he did not draw it out of trade before he died; these last words were held by Lord Hardwicke to make the legacy specific, *Ellis v. Walker*, Ambl. 309. Where the whole or part of a specific debt due to a testator is given as a legacy, it is a specific legacy, *Lawson v. Stitche*, 1 Atk. 507. But if the debt be not made the particular fund out of which the le-

gacy should issue, but only a power be given to the legatee of taking part of the debt, (if it should happen to be subsisting at the time of the testator's death), then it appears the legacy would not be considered as specific. *Ib.* If, however, a legacy is so specific, and so connected with the fund as to fail, if there is no such fund, it appearing there was a fixed, independent, separate, distinct intent to give the legacy, and that the particular property out of which it is to be paid, was a secondary thought, the legacy may stand, though the fund out of which it is to be paid may not exist. *Mann v. Copland*, 2 Madd. 223. Bequests "of my stock," or "in my stock," or "part of my stock," or stock in a particular fund, denote specific legacies, *Avelyn v. Ward*, 1 Ves. 420. *Sleech v. Thorington*, 2 Ves. 560. *Webster v. Hale*, 8 Ves. 410. A legacy of such part of the testator's stud of horses as the legatee should select, to be fairly valued and appraised to the amount of £800, is clearly specific. So a bequest of property in the 3 per cent. consols, and Irish 5 per cents. to be sold out, and the net produce to be equally divided between certain legatees, some to take immediately, and others when they come of age, is a specific legacy. *Richards v. Richards*, 9 Price, 219. Indeed, the same legacy may be specific where it can be specifically satisfied, and general, where it cannot. *Ib.* 94. The word "my," is evidence of a legacy being specific, when the particular stock is also referred to; but the word "my," is not enough alone to make a legacy specific, *Parrott v. Worsfield*, 1 Jacob & Walker, 594. In the case of *The Dean and Chapter of Christ Church v. Barrow*, Ambl. 641, where pictures were bequeathed to be kept, and none of them to be sold, they being a good collection, Lord Camden held, though the testator parted with some and purchased others, that all the pictures would pass. Where a testatrix, after stating, "that it was the wish and desire of her mother and herself, that the 500*l.* they had then out upon mortgage, should be given to A. B. and her family, in manner thereafter mentioned," gave and bequeathed to her executors, immediately after the decease of her mother, *the said* 500*l.* with all interest due thereon, upon certain trusts, for the benefit of the said A.B.; Sir William Grant

said, the question might be decided from the face of the will itself. It was the essential characteristic of the legacy, that it consisted of a sum in which the testatrix admitted that her mother and herself had some sort of joint interest, and which they were both desirous of giving to A. B. and her family. This characteristic was not at all dependent on the particular security on which the money might be placed. The testatrix considered the circumstance of its being at that time out on mortgage as merely accidental. She speaks of the *500l.* "we have now out upon mortgage." That is descriptive of the present situation of the money. The next day it might not be out upon mortgage, but it would still be *the 500l.* in which the mother and the daughter had a joint interest, and which, at the time of the will, they had out upon mortgage. The thing given is not the mortgage, but the money. It is *the said sum of 500l.* that she gives to her executors. What is the said sum? That sum of *500l.* which belonged to her and her mother, and which, at a given time, was out upon mortgage. Whether it remained out upon mortgage at the time of the testatrix's death, was a matter of indifference. That circumstance was no ingredient in the gift, either by way of condition or of inherent description. *Le Grice v. Finch*, 3 Meriv. 50.

It would therefore appear, that where it is clearly evident that a testator intends to separate the particular subject of the bequest from the general property and effects, such bequest is a specific legacy. Bequests of stock may be either specific legacies or general legacies, consisting of quantity only, without reference to the stock of which the testator may be possessed. If it appear that the testator intended to give part of a particular stock, the legacy would be so confined; but where that intention does not appear, the legacy is general. The intention of the testator, to be gathered from his will, and from the situation and circumstances of his property, will govern the construction; and there is no invariable rule which can be laid down. *Ashton v. Ashton*, Ca. T. Talb. 152. S. C. 3 P. Wms. 384. *Avelyn v. Ward*, 1 Ves. 420. The ordinary criterion of a specific legacy is, that it is liable to ademption; that is, if the particular thing bequeathed, or

the particular species is once gone, the gift is lost to the legatee. The court leans against considering legacies as specific, because of the consequences; but, where they are clearly specific, they may be adeemed; that is, revoked or taken away, either expressly by the testator, or by implication.

To prevent litigation, it seems desirable, where a specific legacy is intended to be given (if any doubt could be raised as to the nature of the gift) that an express declaration should be inserted in the will, "that such legacy shall be and be deemed to be a specific legacy, and shall have and be subject to all the properties of a specific legacy;" for if a legacy be declared to be specific, and it should fail, or be adeemed by sale or otherwise, in the testator's life, the personal estate will be exonerated therefrom; but if not specific, the personal estate will be chargeable therewith. But if this be not the intention, prudence requires that a clause be inserted, declaring the wishes of the testator.

In *Hambling v. Lister*, Ambl. 401, and other cases of that class, (3). Ademption an indication of change of mind in the testator was considered of specific necessary to work an ademption of a specific legacy: thus, if a legacies. debt given specifically was called in, and no account appeared why it was so called in, the legacy was considered as adeemed; but if any account could be given, it was otherwise, as it was the intention that governed the construction at law. This principle, however, of the *animus adimendi*, as tending to inexplicable confusion, has been altogether repudiated in the later cases. In *Stanley v. Potter*, 2 Cox, 180, Lord Thurlow said, he had taken all the pains he could to sift the several cases upon the subject; and he could find no certain rule to be drawn from them except this, to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases); and, if specific, whether the thing remained at the testator's death. It must be considered in the same manner as if a testator had given a particular horse to A. B.: if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest could operate. The idea of proceeding on the *animus adimendi*, had introduced a degree of confusion in the cases, which was inexplicable; and no precise rule can be made out from

them on such ground. It is a safer and clearer way to adhere to the plain rule before mentioned, of inquiring whether the specific thing given remains or not. For where a testator gives by his will a particular sum of money, and he afterwards receives and spends it, there is no end to the confusion arising from following any other line. The same doctrine was afterwards confirmed in *Humphreys v. Humphreys*, 2 Cox, 184.

In *Barker v. Rayner*, 5 Madd. 208, the Vice Chancellor stated, that, after looking particularly into the conflicting decisions on the question, he was of opinion that it must be considered as a general principle, that if the subject of a gift should not remain *in specie* at the death of the testator, the gift was gone. And in *Fryer v. Morris*, 9 Ves. 360, the Master of the Rolls says, "The principle of ademption, by receiving the thing given, is certainly that the thing given no longer exists; for if, after the receipt of it, it could be demanded, that would be converting it into a pecuniary instead of a specific legacy."

It may therefore now be considered as an established principle, that, in the case of a specific legacy, the court is only to inquire whether the specific thing remains at the death of the testator, and the question will not be entertained, whether it has or has not ceased to exist by an intention to adeem on the part of the testator.

(4).  
Abatement  
of legacies.

Legacies cannot be paid until all the debts of the testator are discharged; and if the assets are afterwards insufficient for the payment of them, the legatees must abate proportionably. But specific legatees are not subject to abatement, until all the pecuniary legacies have been absorbed in supplying the deficiency of assets, and then they must abate proportionably amongst themselves. *Duke of Devon. v. Atkins*, 2 P. Wms. 382. On the one hand, therefore, specific legatees have the benefit of not contributing with general legatees, in case of a deficiency of assets; on the other hand, they are liable to hazard, as the gifts may fail; and in case of such failure, these legatees cannot demand any contribution from the pecuniary legatees. *Hinton v. Pinke*, 1 P. Wms. 539.

No difference in right or in preference will be caused by the appointment of a legacy to be paid at an earlier time than other

legacies, or to be paid "in the first place;" but the legatee is liable to abatement in case of deficiency of assets. *Brown v. Allen*, 1 Vern. 31. Those, and similar expressions in a will are considered as only marking the order in which it occurs to the testator to give the directions to his executors, or the order in which it occurs to him to name the objects of his bounty; and therefore the presumed intention, that all the legacies are to be paid equally at those times, remains undisturbed. *Beeston v. Booth*, 4 Madd. 161. But the presumption that the testator considered that he possessed property sufficient to pay all the legacies, and that he intended that all should be equally paid in their order, will of course be repelled by an express declaration to that effect. Where there is any doubt as to the sufficiency of the assets, and, indeed, in almost every case where the principal part of the property of the testator is personalty, it is extremely desirable, as respects the wife and children of the testator, that a declaration should be introduced in the will, in order to control the general rule of law; for the same rule will apply even as respects the wife or children. Yet, on account of the moral obligation imposed upon a testator to provide for those objects of his affection, and because it is natural he should intend to secure a provision for them before conferring any benefit on collateral relations or strangers in blood; the Courts would, it is presumed, control the rule of law, and seek for expressions or circumstances justifying such construction; and would probably consider the declaration of such intent to be conveyed in words, which would in other cases be inadequate to the purpose. As if a testator should say, such bequest, legacy, or provision "shall be paid in the first place," or should use any other words slightly indicative of priority or preference. It would be folly, however, to trust to such mode of construction, when all doubt may be removed by the proper penning of the will. *Lewin v. Lewin*, 2 Ves. 414.

If legacies be given to executors "for their care and pains," they shall abate proportionably. Whether the words *care and pains* be expressed or omitted in the will, entirely depends on the whim of the drawer of the will. The gift would still be a

legacy (*but see note "Residue"*). A legacy to executors cannot be considered as a debt, nor would the executors, on such account, be entitled to preference *virtute officii*, for that can never be a debt to the executor which was not so as respects the testator; and, besides, executors may, if they please, renounce probate of the will. *Attorney-General v. Robins*, 2 P. Wms. 23. *Heron v. Heron*, 2 Atk. 171.

But if a legacy be given to the wife of the testator, *in consideration that she release her dower*, she will be entitled to preference upon the ground, that the testator, by setting a price upon her dower, constituted her a purchaser (provided there was any thing to purchase), for if the wife were not entitled to dower, or if she had a jointure in bar of dower, the words would amount to nothing, and she would not be entitled to the legacy without abatement. *Blower v. Morret*, 2 Ves. 419. *Davenhill v. Fletcher*, Ambl. 244.

Legacies in a codicil must abate equally with legacies in a will; they will not, because they are last given, be entitled to preference, as the codicil must be taken as part of the will. If a man give legacies by his codicil, expressly because he apprehends there will be a surplus after the payment of the legacies in the will, the legacies in the codicil must take place only out of the supposed surplus, that is, they must abate *in toto* before the legacies in the will abate at all. So, if a man, after having given some legacies by his will, give others by the same will, because he apprehends there will be a surplus beyond what he had before disposed of, the latter legacies shall abate *in toto* before the former legacies abate at all. Where a man gives any legacies by his will under the express apprehension of a surplus, the legacies in any codicil he may afterwards make, shall *prima facie* be taken to have been given under the same apprehension, and shall abate accordingly. But if the testator take notice in his codicil, that there may be a deficiency, and, in that event, directs that a particular bequest to about the amount of the legacies in the codicil should not take effect, the legacies in the codicil shall not abate more than the legacies in the former part of the will. Such clause, however, in the codicil, would not prevent the latter le-

gacies in the will from abating *in toto*. *Attorney-General v. Robins*, 2 P. Wms. 23.

Charitable legacies must, on a deficiency of assets, abate proportionably with other legacies. *Ib.*

Although a legacy is to be taken as a gift, yet a man should be intended to be just before he is kind. But where there are assets, and he intended both, it may be as good equity to construe of debt. him both just and kind. (5). When in

In the absence of a declaration on the part of the testator, it is a general rule, that a legacy, to be considered as in satisfaction of a debt, must be equal to or greater than the debt, and must be of exactly the same nature and certainty; if a legacy be less than the debt, it shall not be construed a satisfaction, *pro tanto*. Although this rule of constructive satisfaction is settled, yet the court will lay hold of any minute circumstance to take a case out of that rule; because a court of equity ought not to prevent a man from disposing of his property as he pleases; and when he says he gives a legacy, he ought not to be contradicted by saying that he pays a debt; and therefore, unless the presumption be strong, that the testator's intention was, that the legacy should be an ademption of the debt, the court would lean against the rule so far as to hold it not to be a satisfaction. The distinctions are not to be taken from particular circumstances of the legatee, dehors the will, such as relationship, affection, services, &c. but they may be found in the will itself. In *Wallace v. Pomfret*, 11 Ves. 547, the Lord Chancellor observed, that this rule of presumption, being once established, and understood to be the rule, it would have been infinitely better that it should not have been destroyed by small observations upon small circumstances, the court trying to find out a distinction. It would have been better, either to have abided by the rule, or to have said boldly it should exist no longer.

The following circumstances, besides the quantum of debt, have, however, prevented the application of the rule of constructive satisfaction. If the thing given be of a different nature, or if the legacy be upon condition, or where a fund is created for the payment of debts, and the legacies are charged thereupon,

or if the debt be due to the legatee upon an open or running account, or where it is given by the will *diverso intuitu*, or where the debt was contracted after the making of the will. Even where an old lady indebted to a servant for wages, by will gave ten times as much as she owed, or was likely to owe; yet because the legacy was made payable within a month after the death of the testatrix, the court would not hold that to be a satisfaction; because the servant might not outlive the month:—again, where a testator gave a bond to pay 20*l.* *per annum* to a person for life, and afterwards by will gave an annuity of 20*l.* to the same person, it was held not to be a satisfaction of the bond. *Atkinson v. Webb*, Prec. Ch. 236. *Eastwood v. Vinke*, 2 P. Wms. 614; and where a testator gave two sums of 200*l.* and 200*l.* which he charged upon his real estate, and directed part of the money to be paid in one year, and part in two years after his death: the time of payment was considered as shewing strongly that the intent of the testator was, that the legacy should not go in satisfaction of a bond debt due to the legatee; for the bond was payable immediately, and the testator had no right to suspend the payment of a debt, though he might suspend a legacy. *Nicholls v. Judson*, 2 Atk. 300.

It is also a rule, that a legacy, which is deemed a satisfaction, must take place immediately after the death of the testator; for the debt would be due at his death; and therefore the legacy must be so too. *Clark v. Sewell*, 3 Atk. 97.

As a legacy to an executor excludes him from the undisposed surplus of the personal estate (*see note* “Residue”); such legacy will not bar a debt owing to the executor, though the debt might be less than the legacy, because the court would not suffer the legacy to operate for two purposes, both for payment of the debt, and to bar the executor’s claim to the undisposed residue. On the doctrine of satisfaction of debts, see, also, *Gibson v. Scudamore*, Mos. 7. *Minuel v. Sarazine*, Mos. 295. *Cranmer’s Case*, 2 Salk. 508. *Byde v. Byde*, 1 Cox, 48. *S. C. 2 Eden*, 19. *Chancey’s Case*, 1 P. Wms. 408. *Crompton v. Sale*, 2 P. Wms. 555. *Richardson v. Greese*, 3 Atk. 64. *Matthews v. Matthews*, 2 Ves. 635. *Rawlins v. Powel*, 1 P. Wms. 299. *Thomas v. Bennet*, 2 P. Wms. 343.

*Eastwood v. Vinke*, 2 P. Wms. 614. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516.

It would be more satisfactory, where a legacy is not intended as the payment of a debt (which in fact is scarcely ever the case), that a testator should expressly state his intention, rather than leave it to implication, or trust to its solution by the rules before referred to. (*See clause XXXIII*). General rules of construction are here stated, in order to shew the necessity of being explicit in the penning of a will, and not to afford opportunity of meeting those rules by parallel cases.

It is a general rule, that, if a legatee die in the life of the testator, the legacy will lapse. (6).

As to the  
lapse of legacies.

If a legacy be given to a man, his executors, administrators, and assigns, and the legatee die in the life of the testator, the legacy is lost, though the executors are named; for the words, "executors, administrators, and assigns," are void, being but surplusage; and, by supposition of law, the representatives are named only to take in succession, and by way of representation: although the testator should shew an intention that the legacy should not lapse, in case of the death of the legatee before him, yet the legacy will lapse, unless other persons are expressly named to take over. *Bridge v. Abbot*, 3 Bro. C. C. 224. *Darrell v. Molesworth*, 2 Vern. 378. In the case of *Sibley v. Cook*, 3 Atk. 572, the testatrix expressly provided for a lapse by death; and it was decreed accordingly. The words were "if any of those persons (the legatees) die before the legacies become due and payable, I will that they or any of them shall not be deemed lapsed legacies" the testatrix then particularized several legatees, and said, "to Ann, the wife of A. B., and to her executors or administrators, I give the sum of 50*l.*" And where a testator gave several legacies, and directed that they should be paid by his trustees to the legatees at the end of one whole year next after his decease, or to their several and respective heirs, it was held that a payment to the representative, at the end of a year after the testator's death, if the legatee were not then living, would not be inconsistent with a personal gift to the legatee. *Tidwell v. Ariel*, 3 Mad. 403. *Stone v. Evans*, 2 Atk. 86. *Corbyn v. French*, 4 Ves. 418.

If a legacy be given to two persons to be *equally divided* between them, and one of them dies in the life of the testator, his share is a lapsed legacy. *Owen v. Owen*, 1 Atk. 495. And where a testator bequeathed the residue of his personal estate to six persons, *to each of them* a sixth part, and made them executors, one of these executors and residuary legatees having died in the life of the testator, Lord Chancellor King was of opinion that this was a lapsed legacy as to one-sixth, and was undisposed of by the will, the residuary legatees being tenants in common, and not joint tenants. *Page v. Page*, 2 P. Wms. 489. But if any legatee, where there is a joint bequest, die in the life of the testator, his legacy shall go to the survivor, as there may be a joint legacy, as well as a joint grant. *Ibid. (n)*. *Willing v. Baine*, 3 P. Wms. 113. Where the residue was given to two persons, who were made executors, and, by a codicil, the testatrix revoked the legacy to one, it was held that the other legatee was entitled to the whole. *Humphrey v. Tayleur*, Anbl. 136. In the case of *Willing v. Baine, supra*, legacies were given to children, payable at their respective ages of twenty-one; and, if any of them died before that age, the legacy given to the person so dying was directed to go to the survivor, one of them having died under twenty-one, in the life of the testator, it was contended that his legacy lapsed and did not go over to the survivors. The argument was, that the bequest over could not take place, as "there can be no legacy, unless the legatee survives the testator, the will not speaking till then; wherefore, this must only be intended, where the legatee survives the testator, so that the legacy vests in him, and then he dies before his age of twenty-one." It was, however, on the contrary, held; and it is now settled, that in such case the bequest over takes place.

In *Doo v. Brabant*, 4 T. R. 706, a testatrix bequeathed money to trustees in trust for A. B. until she should attain twenty-one, and then to pay the same to her; and if she should die under twenty-one, leaving a child or children, then in trust for such child or children: And if she should die under twenty-one, without leaving a child or children, or being such, and they should all die under twenty-one, then over. A. B. attained

twenty-one, married, and had two children, but she died in the life of the testatrix, leaving two infant children surviving her, it was held by the Court of King's Bench, on a case sent to them, that the children could take nothing by the will, although it seemed probable that if the event had occurred to the testatrix, she would have provided for it, and given the money to the children, but not having done so, the Court could not make a will for her. In *Calthorp v. Gouth*, 4 T. R. 707, (n.), a sum of money was bequeathed in trust for the separate use of a married woman, and in case she should die in the life of her husband, then as she should appoint, and, for want of appointment, among her children; but if she should survive her husband, she was to take the whole absolutely. She died in the life of the testator, having survived her husband, and this was determined to be a lapsed legacy.

Where a testator bequeathed to his son a sum of money to be transferred to him on his completing and fully accomplishing his apprenticeship, and the interest in the mean time to be applied for his maintenance, and directed that in case his son should die before he accomplished his apprenticeship, then, and in such case, the testator gave the money over to other children. In this case, if the son, having completed his apprenticeship had survived the testator, the legacy would have vested in him absolutely, but he completed his apprenticeship before the death of the testator, and within the terms of the will; and his death, in the testator's life, was held to produce a common case of lapse, and that the residuary legatees were let in, and that the limitation over was destroyed. *Humberstone v. Stanton*, 1 Ves. & Bea. 385.

It seems therefore proper that such contingency should be expressly provided for by the testator, and that a declaration should be inserted in the will, "that in case the legatee should survive the period at which the legacy is declared to vest, and should afterwards happen to die during the life of the testator, that then and in such case the legacy shall not lapse, but shall go and belong to the person and persons to whom the same is given by the will in case of the death of the legatee after the death of the testator, and before the said period had arrived."

(7). If a debt due to the testator be mentioned in the will to be bequeathed to the debtor without words of release or discharge debtor of the debt, if the debtor die before the testator, that will be a money owing to the lapsed legacy, and the debt will subsist. *Toplis v. Baker*, 1 P. testator. Wms. 86, (n). The bequest in the text to C.D. of the debt owing by him to the testator, will not lapse, though C.D. die in the lifetime of the testator. *Sibthorp v. Moxom*, 3 Atk. 579. This cannot operate as a release at law, yet it will in equity, and if an action be brought on the bond or other instrument securing the debt, the court will grant an injunction.—*Ibid.* Where a testator "gives" a debt, or "forgives" a debt, it is a testamentary act, and will not be good against creditors, but against an executor it may.—*Ibid.* A distinction was drawn by the court between that case and the case of *Elliot v. Davenport*, 3 Vern. 521, S. C. 1 P. Wms. 83, in which the words were not penned as "forgiveness" or "remission." In *Sibthorp v. Moxom*, the testatrix seemed to have in contemplation some benefit to all the branches of her family. The son-in-law, whose debt was released by the will, died in the life of the testatrix, and his daughter claimed the benefit of the relinquishment of the debt; the court observed it would be hard to say, that, because the son-in-law died in the testatrix's life, that the grand daughter, who was of the testatrix's blood, should lose it. The other leading cases, *Toplis v. Baker*, *Elliot v. Davenport*, *supra*, and *Maitland v. Adair*, 3 Ves. 231, are not equally strong against the application of the general rule as to lapses of legacies. The word used in *Elliot v. Davenport*, was only "give," in *Maitland v. Adair*, "return." If the question arose merely on the operation of the words "forgive, or give, or return," it does not appear that the case would not be distinguished so as to take it out of the general rule of law.—In *Izon v. Butler*, 2 Price, 34, the bequest was in these terms: I remit and forgive to A.B. the sum of 500*l.* which he stands indebted to me on his bond, and I direct the said bond to be delivered up to HIM and cancelled. It was held that the bequest was a personal legacy, and intended for his benefit only. It is particularly to be observed, that in

*Sibthorp* and *Maxom*, Lord Hardwicke relied much on the circumstance that there was no direction requiring a delivery of the security to the *legatee personally*, but the direction was general, and therefore it was intended in all events that the bond should be delivered up to be cancelled.

It appears necessary, in order to bring a relinquishment of debt out of the principle of the before mentioned cases, that the clause of release in the will should be specially penned; Clause XXXI. in the text may be used, or there may be an express direction inserted, that "in case of the death of the debtor in the life of the testator, the executors and administrators of the said (debtor) and also his estate and effects shall be released and discharged from the payment of the debt, and from all interest due thereon from the death of (the testator), and that the bond or other security shall be delivered up to the executors or administrators of the said debtor to be cancelled."

If a testator make his debtor his executor, the debt is released in equity. *See notes, "Debts," "Executors."*

The rule has never yet been departed from, that, *prima facie*, As to satisfy a portion to a child by the will of the parent, if there is any faction of other provision, is a satisfaction, unless it is shewn clearly that it legacies or is not so intended: and where it comes to be a question between portions to parent and child, small circumstances are not sufficient to repel the presumption, which with regard to third persons would be sufficient. Thus in *Hartop v. Whitmore*, 1 P. Wms. 681, it is laid down, that if a parent give his daughter a portion by his will, and afterwards gives to the same daughter a portion in marriage, this is a revocation of the portion given by the will, for it will not be intended (unless proved) that the father had assigned two portions to one child. No objection to this construction can be raised by the circumstance of the father having lived long after giving the portion to his child, without revoking that part of his will, as there could be no need that the father should revoke the legacy, as he had already done so by giving the portion during his life. And again, where a father, after making his will, advances his child with a portion as great, or greater than the legacy given by the will, such provision has been always

(8).

held an ademption. *Farnham v. Phillips*, 2 Atk. 214. An advancement by way of portion for a daughter in the life of the father, has been truly said to be a debt of nature from a parent to a child. Therefore a legacy given generally under a will must be considered as a portion, and if the father afterwards gives a sum upon her marriage, it is for the same end, and is considered as an ademption of the legacy. The case is also the same between collateral relations as between uncle and niece, standing *in loco parentis*, but does not extend to remote relations or to strangers. *Shudal v. Jekyll*, 2 Atk. 515. *Scotton v. Scotton*, 1 Strange, 235.

The court leans strongly against double portions or double provisions, and therefore, where a portion is secured to a child by marriage settlement or otherwise, and the parent afterwards gives by his will, and attended with the same degree of certainty, a legacy or provision equal to or greater than the portion, it will be held a satisfaction *in toto*, or a satisfaction *pro tanto*, if the legacy be less than the portion. Thus, a grandfather, on settling his estate declared that if his son should die without issue male, leaving a daughter, the trustees should raise out of the premises 5000*l.* to be paid to such daughter within a year after her marriage, or at her age of twenty-one, which should first happen; the son afterwards settled the same estate, creating a trust for raising 8000*l.* for raising daughters' portions, if no issue male, payable at eighteen if then married, or at any time after when married. The son (having no issue male) by his will devised his lands chargeable with his legacies, and bequeathed to his daughter, for her portion, 8000*l.* viz. 4000*l.* part thereof to be paid at the age of eighteen years, and 40*l.* the residue, within a year after her marriage, or in all events at twenty-one, and devised to her 150*l.* *per annum* until eighteen, and afterwards 200*l.* *per annum* for her life. The will declared that the 8000*l.* given thereby was for the plaintiff's portion, and the 8000*l.* and the annuity of 200*l.* *per annum* for her life, appeared to be the most beneficial. It was observed by the court that when only one portion was intended, the daughter should not sue for three. And that forasmuch as the daughter had no remedy to recover any of her portions, but by the aid of a Court of Equity, she should not recover more than was intended for her.

But as she was then an infant, she should not by this decree be precluded from electing the portion by the marriage settlement, if, when she came of age, she should think that it would be for her advantage. However, she should not have two portions instead of one. *Copley v. Copley*, 1 P. Wms. 147.

The doctrine of ademption of legacies is confined to the cases of parents and of persons placing themselves *in loco parentis*. But a testator may describe himself so that the gift by will, and the gift made in his lifetime may be intended for the same purposes: still it must appear that he meant to put himself *in loco parentis*.

An implied ademption will not arise, if the provision by the will be provided for out of the residue of the testator's estate. *Freemantle v. Bankes*, 5 Ves. jun. 79. *Farnham v. Phillips, supra*. Or if the provision be not *ejusdem generis*, as where a father by his will gave a legacy of 500*l.* to his son, and afterwards took his son into partnership, and by the deed of partnership declared that the stock should be 3000*l.* that it was to be brought in equally, and that they were to be equally entitled to the profits. The father brought in the whole capital, and it was understood by the family that he meant to give the son the half of the stock. The question was, whether the advancement was a satisfaction of the legacy of 500*l.* and it was held not to be a satisfaction, as not being *ejusdem generis*; and that it must have been the testator's intention that the son should have both. *Holmes v. Holmes*, 1 Cox, 39. *Gilbert v. Wetherell*, 2 Sim. & Stu. 254.

In conclusion, it may be observed on this head, that the legacy, to be an ademption, must, first, be equal to the portion; secondly, equally beneficial; thirdly, *ejusdem naturæ*; and fourthly, certain. These are established rules, where the question arises upon a simple bequest of a pecuniary legacy to a child, without intimation of the amount, and intended application of it; but these rules do not apply to any case wherein the intent of the testator is manifest and is expressly declared in his will. *See clause XXV.*

There is a distinction between the cases of satisfaction and performance. Upon the question of performance, it is sufficient, if, in cases where a man has covenanted to do a thing, he do something performance of covenants. (9).

tantamount to it, or if the thing covenanted to be done be done through the effect and mere operation of law; nor is the law different between a performance of the whole or of part only. *Richardson v. Elphinstone*, 2 Ves. jun. 463. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. *Sparkes v. Cater*, Ib. 530.

The leading cases on this subject are *Blandy v. Widmore*, 1 P. Wms. 324. and *Lee v. D'Aranda*, 1 Ves. 1. S.C. 3 Atk. 419. These still remain unimpeached, and are to be considered as established authorities, notwithstanding the imputation cast upon them in *Haynes v. Mico*, 1 Bro. Ch. Ca. 129. In the first-mentioned case, in consideration of the marriage and marriage portion, it was agreed, that the husband should leave the wife 620*l.* within three months after his death: he died intestate, upon which the wife by the statute of distribution became entitled to a moiety of the personal estate, which was much more than 620*l.* the court held the covenant not to be broken, for the agreement was to leave the widow 620*l.* The husband, by his intestacy, did leave the widow 620*l.* and upwards, which as administratrix she might take presently upon her husband's death: wherefore, said the Lord Chancellor Cowper, let her take it presently upon her husband's death; but then it shall be accounted as in satisfaction of and to include in it her demand by virtue of the covenant, so that she shall not come in first, as a creditor for the 620*l.* and then for a moiety of the surplus. In the second case (*Lee v. D'Aranda*), the husband covenanted by articles before marriage to leave his wife by deed or will 1000*l.* at his death, if she survived him, or that his executors should pay it to her within six months afterwards; the husband died intestate, and Lord Hardwicke decreed that if her share of the personal estate was of equal value to, or exceeded, 1000*l.* it should be a satisfaction, and she should not come in first as a creditor for that sum and then for a moiety of the surplus. Those cases are distinct authorities, that where a husband covenants to leave or to pay, at his death, a sum of money to a person who, independent of that engagement, by the relation between them and the provision of the law attaching upon it, will take a provision, the covenant is to be construed with reference to that; and the court will not look upon the slight difference between leaving and

paying, or whether payment is to be within three months or six months. In that respect there is always a difference upon what is to be taken (in one sense) at the end of twelve months, but which (in another sense) is to be taken from the death of the testator; for the other period is only for convenience, and there is no doubt the property is vested at the death of the party, and if a case was produced, in which it was quite clear that there were no debts, the court would give the fund to the party, notwithstanding there had not been a lapse of twelve months. *Garthshore v. Chalie*, 10 Ves. 1.

The important decision of Lord Eldon in *Garthshore v. Chalie*, is entitled to particular attention, as embracing the whole doctrine on this subject; and though Lord Bacon, *De Augm. Scient.* says, respecting the arguments of counsel, “*de advocatorum perorationibus sileto*,” yet the student may, with advantage, peruse the arguments of the counsel in the present case at least, as furnishing additional light on the subject. Indeed, when the student is fully master of the subject, it is difficult to say when he ought not to attend to the arguments of the counsel in any case. They are intended to inform the judgment of the court, and why should not the mind of the student be presented with the most striking features of what can be advanced on both sides?

On the doctrine of satisfaction of portions see also *Watson v. Earl of Lincoln*, Ambl. 325. *Biggleston v. Grubb*, 2 Atk. 47. *Spinks v. Robins*, 2 Atk. 490. *Lechmere v. Earl of Carlisle*; 3 P. Wms. 211. *Sowden v. Sowden*, 1 Bro. Ch. Ca. 582. *Thellusson v. Woodford*, 4 Madd. 429. *Noel v. Lord Walsingham*, 2 Sim. & Stu. 99.

Legacies given upon certain conditions in restraint of marriage are the subject of discussion in note “Conditions in restraint of marriage.” (10). As to condition legacies.

It is a rule long ago established, that where there is a gift, with a condition inconsistent with and repugnant to such gift, the condition is wholly void. In all such cases the gift stands, and the condition or exception is rejected. A testator introduced the following clause into his will:—“Having observed, during the term of my life, so many fatal examples of parents having

left their children in a state of opulence, who have afterwards been reduced to want the common necessaries of life, my principal view in this will is, that my wife and children may have a solid sufficiency to support them during their lives. For this purpose, I will and most strictly ordain, that if my wife, or any one of my children shall attempt to dispose of all or any part of the bank stock, the dividends from which is bequeathed to them in this will and testament for their support during their lives, such an attempt by my wife or any of my children, shall exclude them, him, or her, so attempting, from any benefit in this will and testament; and they shall forfeit the whole of their share, principal, and interest, which shall go and be divided unto and among my other children, in equal shares, who will observe the tenor of this will and testament." It was held, that the condition annexed to the legacy, was repugnant to, and inconsistent with, the interest given to the legatees of the stock, and therefore void. *Bradley v. Peixoto*, 3 Ves. 324. The object thus frustrated, may however be successfully attained by the intervention of trustees. [See *Index in loc.*]

A testator made a general bequest of leasehold property, upon condition that the legatee should assign part thereof to a charitable purpose; it was contended that the legatee was, with respect to such power, a mere trustee, and that the trust being void, [*sec note "Mortmain,"*] it belonged to the next of kin. But the court held, that this was an absolute gift of the whole leasehold property upon an illegal condition to assign part; and that therefore the legatee was entitled to the whole. *Poor v. Mial*, 6 Mad. 32.

Again, where a provision was made by a testator, that any legatee controverting the disposal of the property, should forfeit his legacy, the condition was held to be clearly *in terrorem* only, and that no such forfeiture could be incurred by controverting any disputable matter in a court of justice. *Morris v. Burroughs*, 1 Atk. 404. But where a condition was annexed to a legacy, that in case the legatee or her husband should trouble or disturb the executors, upon any claim or pretence by virtue of the custom of London, the legacy should go over to the children of the testator's

deceased daughter; the court observed, that the husband and wife having insisted upon the custom, the legacy was forfeited; and that the legacy being devised over, became vested in a third person, from whom a court of equity could not fetch it back again; the right of the feme covert did not affect the question, as all personal things were under the power of the husband, who could either release or forfeit them. *Cleaver v. Spurling*, 2 P. Wms. 526. And where there was a mortgage and disposition to the younger children, and the eldest son was entitled, under a settlement previously made, and a legacy was given to the son on condition that he did not disturb the trustees, it was decreed, that, if he would join with the trustees in a sale of the premises for the purpose of paying off the mortgage, and vesting the surplus in the executors for the benefit of the children, he should have the legacy, but, if not, he should forfeit the legacy. *Webb v. Webb*, 1 P. Wms. 132. lb. (n).

A condition or promise by a legatee to do an act in favor of a third person, in consideration of the benefit to that legatee, derived under the will of the testator, must be performed. There is no case in which the court has not decreed it, whether such an undertaking were given before the will or after. This is not setting up any thing in opposition to the will, but taking care that what has been undertaken shall have its effect; and it is to be presumed, that, if the legatee had not so promised, the testator would have altered his will. Such failure in performance is a case of fraud upon the testator, aggravated by the promise of the legatee, and by his representing that there was no occasion to alter the will, it therefore comes within the proper jurisdiction of the court as *imposition*. *Drakeford v. Wilks*, 3 Atk. 539. *Reech v. Kengegal*, 1 Ves. 123. S. C. Ambl. 67. The case of *Whitton v. Russell*, 1 Atk. 448, does not militate against the decisions in the before-mentioned cases, although the contrary has been suggested. In *Whitton v. Russell*, the testator left a legatee 20*l.* a-year; and after talking of making another codicil, and leaving him 15*l.* a-year more, the attorney told him, that if the three devisees of his estate would give a bond to the legatee to pay him 15*l.* a-year more, it would be sufficient; and accordingly, one of

the devisees present promised that he and the other devisees would do so. The testator did not make another codicil. The application to the court on behalf of the legatee, was considered as an attempt to charge lands with an annuity without writing, and expressly against the statute of frauds. At the time of making the will, the testator talked only with *one* of the devisees, of giving an additional 15*l.* a-year. Moreover, the testator lived five weeks afterwards, but did nothing towards procuring the bond or altering his will. It did not appear upon the whole that the testator had therefore been drawn in by the promise not to add the legacy by a codicil; and besides, the legatee remained nine years after the death of the testator, without demanding the performance of the promise.

Where a legacy was given to a father, on condition that he did not interfere with the education of his daughter, the court directed the legacy to be paid to him on his giving security to observe the condition. *Colston v. Morris*, 6 Madd. 89.

A testator, whose son was abroad, and from whom he had not heard for a considerable time, and who was therefore in all probability not living, bequeathed to him a legacy with the following condition, "that he shall not be entitled thereto unless he shall return to England, and personally claim the same of my executrix, or her executors or administrators, or in the church porch of the parish church of Great Waltham, in the presence of two witnesses; and in case my said son shall not return to England, and claim the said legacy in manner aforesaid, within the space of seven years from the time of my decease, then my will and meaning is, that he shall be presumed to be dead; and in such case, the said legacy hereby given to him, shall be deemed a lapsed legacy, and sink into and become part of the residuum of my personal estate; and I hereby will and direct that the said legacy shall be continued in the Bank by my executrix for the time aforesaid after my decease, until sufficient proof of the death of my said son shall be produced, or such claim thereof shall be made in manner aforesaid within that period; and that the dividends which shall from time to time become due thereon, shall be received and vested in the same fund, to accumulate,

together with the dividends which shall become due upon such accumulated fund, for the benefit of my said son, in case he shall make his claim thereto in manner and within the period aforesaid, or otherwise of my residuary legatee." The legatee was living at the death of the testator, and survived the testator about three years, but he did not return to England or personally claim the legacy, though he was apprised of it by letter, transmitting a copy of the will, the receipt of which he acknowledged, expressing his intention of coming to England when his affairs permitted it. But he died of the yellow fever just as he was embarking for England, so that he was prevented by the act of God from making his claim before the expiration of the prescribed period. No laches could therefore be imputed, as there was no reason for claiming at an earlier period. On the other hand, the intention was clear, to impose on the legatee, as a condition precedent, the necessity of returning to England, and in person claiming the legacy. If it could have been shewn, that the only object of the will had been, to ascertain that the legatee was living, and that this was the mode adopted; then certainly, upon the authorities, the legacy would have been due and have been payable to his representatives. But the language of the will plainly shewed that the testator did not mean the legacy to be taken, unless the fact that the party was living was pointed out by the *particular means* required by the testator. *Tulk v. Houlditch*, 1 Ves. & Bea. 248; and see *Pearsall v. Simpson*, 15 Ves. 29. *Broome v. Monk*, 10 Ves. 618. So, where a testator charged certain sums of money upon freehold and leasehold hereditaments for the benefit of his nephews, and directed that the same should be paid to them respectively, as soon after his decease as they or either of them should arrive in England or claim the same, provided such claims should be made within the first three years after his decease; and if two only of his said nephews should arrive in England, or make their claims within the time aforesaid, each of them should be paid the legacy or sum of 250*l.*, and if only one of his said nephews should arrive in England, and make his claim within the time aforesaid, he should be paid 400*l.*, and the residue of the said sum of 600*l.* in either case should be

considered and taken as part of the residue of his personal estate; and if neither of his said three nephews should arrive in England or claim their legacies within the time aforesaid, the sum of 500*l.* part of the said three legacies or sums so given and bequeathed as aforesaid, should sink into and be taken and considered as part of his residuary personal estate. No claim had been made of the legacies, and the executors had advertized for the nephews, but none of them had appeared. The Vice Chancellor said, the question was, whether the event had taken place, which entitled A. B. to the 500*l.*? Before a decree could be made for the payment of the residuary bequest, there must be a reference to the master to inquire, whether the nephews arrived in England within three years after the testator's death, or made any claim within that time. It appeared pretty clearly by the answers, that no claim had been made, but it might turn out that they arrived in England within the three years, though they had not appeared or claimed their legacies. *Burgess v. Robinson*, 1 Madd. 172.

If a sum of money be given on terms which are conditional, the legatee can only take the money by a compliance with the condition, as where a testator "ordered his executors to pay to A. B. 6000*l.* on his notifying his willingness to release certain claims the legatee made on a certain estate, and on that condition only gave to him the legacy." *Vernon v. Bethell*, 2 Eden, 110. And again, where a legacy was given upon condition that the legatee should release all claims upon the testator's estate and effects within a limited period, and the legatee had taken the legacy without executing a release, it was held, that he was bound by his election, and that his executors should release. He accepted the legacy, and was bound to perform the condition, it being a standing maxim in equity, *Qui sentit commodum, sentire debet et onus*. The testator was considered as dealing with his son upon condition, and that he gave him *quid pro quo*. The testator having devised certain lands by words of present gift, remitted a mortgage debt of 35,000*l.* and required a release to be given before his son should take the benefit under his will. The condition was considered as annexed to the body of the gift,

and as passing with it. The acceptance of the gift was equivalent, both in equity and conscience, to the release itself, for the release not being a condition precedent, the acceptance carried the release with it. *Earl of Northumberland v. Earl of Aylesford*, Ambl. 540. 657. The court cannot grant relief to a legatee after acceptance.

A testator bequeathed to his niece a small legacy for mourning, and directed, that if she lived with her husband, his executors should pay her 2*l.* per month, but that if she lived separate from him and with her mother, then they should allow her 5*l.* a month; the court held, that she was entitled to the monthly payment of 5*l.*, and that the condition annexed was *contra bonos mores*, and that, therefore, the legacy was simple and pure. *Brown v. Peck*, 1 Eden, 140. As to conditions *contra bonos mores*, see Swinb. part 4, sec. 5.

Where the same quantity has been given, and the same cause continued, or no additional reason assigned for a repetition of the stitutional gift, the court has inferred the testator's intention to be the same, legacies. and that one legacy only would pass, but where the same quantity is given with any additional cause assigned for it, or any implication to shew that the testator meant that the same thing *prima facie* should accunulate, the court has decided in favour of the accumulation. *Ridges v. Morrison*, 1 Bro. C. C. 393. So, that where two equal legacies are given in the same will to the same legatee, one only will pass, and where both bequests are of the same sum and for the same cause, one only shall be taken, unless an intention appear to the contrary. *Hooley v. Hatton*, Ib. (n). Consequently, a legacy of the same sum for the same cause, given by a codicil, is repetition and not addition. *Benyon v. Benyon*, 17 Ves. 43. *Hemming v. Gurrey*, 2 Sim. & Stu. 311.

Where certain legatees claimed under three testamentary papers to be entitled to double legacies: The first testamentary paper being in these words, "to A. B. (who was appointed executrix), for attending during her life and seeing all these directions executed during her life, and by her last will and testament directing the same to be done by her executors, 1000*l.*" By the third testamentary paper, "to the said A. B. (who

(11).

was also appointed executrix), tax deducted out of my property, 1000*l.*;” the court observed, if the legacies were alone to be considered, the legatee would be plainly entitled to both (as double legacies), but the question was, whether the third instrument did not afford internal evidence, that it was meant by the testatrix, not as an addition to the first instrument, but as a substitution for it. It began with all the forms of the first instrument, with the same expressions of religious resignation, nearly in the same words. It then proceeded to appoint A. B. her sole executrix, by the same description as in the first instrument, and it then proceeded to give, with little variation, the same legacies to the same persons who were the objects of her bounty by the first instrument. The court thought the inference irresistible, that the testatrix intended the third instrument as a substitution for the first, and that A. B. must therefore take the unconditional legacy of 1000*l.* given by the third instrument, in the place of the conditional legacy given by the first instrument. *Attorney-General v. Harley*, 4 Madd. 263. It is to be observed, that legacies of different amounts, whether given by the same instrument or by different instruments, are cumulative, unless some reason appear on the face of the instrument for their being substitutional.

All these cases shew the necessity, in order to remove ambiguity, that the intent of the testator should be manifest and be expressly declared, for “it is an everlasting maxim of law and equity, that every man may impose what terms he pleases with respect to his gifts and legacies;” in a great multitude of the cases on the subject of legacies, the question is, what is the testator’s intent?

(12)  
As to the  
vesting  
of  
legacies.

The rule of construction, as to the vesting of legacies, is, that if a legacy be bequeathed to one generally, to be paid or payable at the age of twenty-one, or any other age, and the legatee die before that age, yet this is such an interest vested in the legatee, that his executor or administrator may sue for and recover it; for it is *debitum in praesenti*, though *solvendum in futuro*, the time being annexed to the payment, and not to the legacy itself. But if a legacy be devised to a person at twenty-one, or if or when he

shall attain the age of twenty-one, and the legatee dies before that age, the legacy is lapsed. Where time is annexed to the substance of a legacy, it does not vest before the period mentioned. As if the legacy be given to a legatee, provided, or if, he attain a certain age, the legacy will lapse, if he die before he attain such age. *Attorney-General v. Milner*, 3 Atk. 111. *Spink v. Lewis*, 3 Bro. Ch. Ca. 355. *Batsford v. Kebbel*, 3 Ves. 393. *Elwin v. Elwin*, 8 Ves. 547. *Faulkener v. Hollingsworth*, cit. Ib. *Sansbury v. Read*, 12 Ves. 78.

Where the time of payment is deferred, either on account of benefit to a person on whose death the bequest vests, or on account of the difficulty of collecting the testator's effects, the legacy is considered as vested at the death of the testator. *Tunstall v. Brachen*, Ambl. 167. *Pinbury v. Elkin*, 1 P. Wms. 563. If a legacy be made to carry interest, it is a vested and transmissible right: for the disposal of the interest for the benefit of the legatee is to be taken as an indication of the testator's desire, that the legatee should at all events have the principal. *Fonereau v. Fonereau*, 3 Atk. 644, and the cases cited. *Leake v. Robinson*, 2 Meriv. 386. But whenever this doctrine has been allowed, the payment of the principal has always been certain.

There is an established and fixed distinction between legacies charged upon personal estate, and legacies charged upon real estate. *Lowther v. Condon*, 2 Atk. 128. *Gordon v. Raynes*, 3 P. Wms. 134. Where a legacy is given charged upon real estate, it has been long established (*Pawlett v. Pawlett*, 2 Vent. 366), that if the person die before the day of payment comes, it sinks for the benefit of the heir, and for this reason, that the charge was not wanted, and therefore the inheritance should not be burthened. *Lowther v. Condon*, 2 Atk. 131. But if the postponing the payment was merely for the convenience of the estate, the court would consider that circumstance as affording very strong ground to imply intention that the legacy should vest immediately. *Smith v. Partridge*, Ambl. 267. *Hodgson v. Rawson*, 1 Ves. 44. This will be the case, whether, by the language of the bequest, the time is annexed to the substance or to the payment of the legacy; a bequest to a person of a

sum of money at twenty-one, or payable to him at twenty-one, sinks into the land, if the legatee die under twenty-one. *Pawlett v. Pawlett, supra.* *Mackell v. Winter,* 3 Ves. 544. *Philips v. Lord Mulgrave,* 3 Ves. 613. *Godwin v. Munday,* 1 Bro. C. C. 191. As general references on this subject see Mr. Cox's note to the case of the *Duke of Chandos v. Talbot,* 2 P. Wms. 610. Butl. note to Fearne's Cont. Rem. p. 552, and Butl. note, Co. Lit. 357 a.

If a legacy be charged on personal estate, and a right of entry be given upon real estate, to hold till the money is raised, this entry will give to the legatee a right to hold the land in the nature of a tenancy by elegit, and it is therefore a chattel interest, and the right of entry will go to his executors. There would be a legal remedy to enter and hold the lands till principal and interest were satisfied. Therefore, the legacy must be paid, though the legatee should die before the time of payment; for the charge would not be an equitable, but a legal charge. *Wigg v. Wigg,* 1 Atk. 382. *Emes v. Hancock,* 2 Atk. 508. *Sherman v. Collins,* 3 Atk. 319. *Manning v. Herbert,* Ambl. 575. *Hodgson v. Rawson, supra.* Where there is a mixed fund of real and personal estate, although a legacy be vested as to the personal estate, yet it is otherwise as to the auxiliary fund: and it would not be raisable out of the real estate, where the legatee dies before the time of payment. *Sherman v. Collins, supra.*

A careful consideration of the cases will shew the propriety of a direction of the testator, explanatory of his intention as to the vested or contingent nature of the bequest. (*See clauses XX. XXI. & XXII.*)

(13).  
As to the payment of legacies. A year from the death of the testator is, generally speaking, the period fixed for the payment of a legacy, upon the presumption that by such time the property has been got in and is making interest. *Bourke v. Ricketts,* 10 Ves. 330. This will be the case, though the fund out of which it is to be paid be making interest. *Gibson v. Bott,* 7 Ves. 97. Where a testator directed his executors, as soon as they should think proper after his decease, to sell out as much of his funded property as would produce 12,000*l.* for the benefit of his daughters, it was held that the daughters

were not to take the interest until the money was raised by a sale of the stock; and that this being to be done, "as soon as the executors should think proper after his decease," amounted to the same thing as a direction to raise and pay the legacy, as soon as the executors should find it convenient. But the court adopted a year as the rule of convenience, and the legacy therefore could not be raised till the end of the year. *Benson v. Maude*, 6 Madd. 15. Upon this ground, interest is payable upon legacies given out of personal estate from the completion of a year from the death of the testator; unless some other period is fixed by the will at that time, the right to payment exists, and carries with it the right to interest until actual payment; and constructive receipt on the part of the executors, is held equivalent to actual receipt, for the purpose of the right to interest. There is no doubt a testator may exclude the rule of the court by plainly indicating an intention inconsistent with it. Such words as, "when received," "when got in," "when recovered," "when laid out," do not so clearly mark the intention as to preclude the application of the legal presumption. *Sitwell v. Bernard*, 6 Ves. 520. *Wood v. Penoyre*, 13 Ves. 333.

This undisputed general rule, that a legacy carries interest only from the expiration of a year after the death of the testator, is founded on this reason, that interest is given for nonpayment of the legacy when due, and that a legacy, for the payment of which no other period is assigned by the will, is not due till the end of the year: but that general rule has exceptions; and however reluctant the court may be to admit them, as productive of litigation, and the difficulty of knowing where to stop, established and authorized exceptions must prevail. The first exception is a specific legacy, an immediate gift of the fund, with all its produce. Another exception is a legacy for the maintenance of the infant children of the testator. The foundations of that exception are the natural obligation of the parent to provide for his child; and the incompetence of the child to give a discharge for the principal. The court therefore concludes that the parent has postponed payment of the principal in respect only of this inability to give a discharge, and infers an intention, that interest shall be paid immediately. *Cricket v. Dolby*, 3 Ves. 16. *Raven v. Waite*, 1 Swanst.

**553.** *Pett v. Fellows*, Ib. 561 (n). How far a legatee, who is not entitled to the payment of his legacy immediately, shall have interest in the mean time, depends upon particular circumstances: some upon relationship; some upon the necessities of legatees; and most of them upon the particular penning of wills; there is hardly one case which can be cited that is a precedent for another. *Heath v. Perry*, 3 Atk. 101 (n).

Where there is a charge upon the personal estate, though it is not immediately payable, yet the person entitled may come into the court, and pray that a sufficient sum may be set apart to answer the legacy, when it shall become due. *Phipps v. Annesley*, 2 Atk. 56. *Heath v. Perry*, 3 Atk. 101. *Carey v. Askew*, 2 Br. Ch. Ca.

58. As to the payment to infants of such legacies as are inconsiderable, see *Philips v. Paget*, 2 Atk. 80. An executor may relieve himself from all responsibility by paying a legacy into the Bank of England, pursuant to the direction of the stat. 36 Geo. 3, c. 52, s. 32.

(14).  
*Descriptio  
personæ.*

A legatee must be described with certainty, so as to prevent the necessity of recourse to extrinsic evidence. *Evans v. Massey*, 8 Price, 22. If there is an absolute want or omission of a devisee or legatee in a will, or where there is only a blank for the name, there no parol proof can be admitted. There are instances where the court has admitted parol evidence to ascertain the person intended by the testator, where he has been mentioned only by a nick name, or where there have been two persons who have had the same christian and surname. *Castledon v. Turner*, 3 Atk. 256. *Baylis v. Attorney-General*, 2 Atk. 239. But where a blank was left for the christian name only of the devisee, such proof was admitted. *Price v. Page*, 4 Ves. 680.

(15).  
*Posthumous  
children.*

Under a bequest or devise to children living at the testator's death, a child *en ventre sa mère* will take, but a very few words will vary the construction of the will. The rule is, that a child *en ventre sa mère* is within the intention of a gift to children living at the death of a testator, not because such a child can strictly be considered as answering the description of a child living, but because the potential existence of such a child places it plainly within the reason and motive of the gift. *Ellison v. Airey*, 1 Ves. 111. *Northey v. Strange*, 1 P. Wms. 340. *Beale v.*

XIX. I give and bequeath the following sunns to the persons hereinafter mentioned, that is to say: to A. B. of, &c. the sum of £ , to C. D. of, &c. the sum of £ Bequest of legacies.

XX. And I direct, that the said legacy herein-before given to the said A. B., shall become an interest vested in the said A. B. immediately upon my decease; but that the payment thereof shall be postponed till he shall attain the age of twenty-one years. [See note *Legacies*, (12).] Legacies to be vested.

*Beale*, 1 P. Wms. 245. So a child *en ventre sa mere* is to be considered within the intention of a gift to children born in the life of the testator, because it is equally within the reason and motive of the gift. *Trower v. Butts*, 1 Sim. & Stu. 181. But where the bequest to the ~~children~~ is general, and not limited to a particular period, it is confined to the death of the testator. In *Northey v. Strange*, *supra*, it was laid down that a devise or bequest to a testator's children and grand-children should, *prima facie*, refer only to such children and grand-children as were living at the time of the making of the will. The court will, however, go as far as it can to comprehend each individual, until one attains the age at which the legacy vests; and in some cases *grand-children* have been held to take under the term "children," the intention upon the whole clause being children or the *issue* of those who should be dead. *Royle v. Hamilton*, 4 Ves. 437. The observation so frequently repeated that the intention of the testator should be particularly expressed in his will, acquires additional force from the cases last quoted.

This note having already far exceeded the intended limit, the remaining heads (which do not immediately relate to the inception of a will) are of necessity omitted.

Ibid.

**XXI.** And I give and bequeath to D. E. the sum of £ , to be paid to him when he shall attain the age of twenty-one years. And I do hereby direct, that notwithstanding the postponement of the time of payment, the said legacy shall become vested in the said D. E. immediately on my decease. [*See note Legacies, (12).*]

Legacy not  
to vest un-  
less legatee  
attain a cer-  
tain age.

**XXII.** And I give and bequeath to E. F. the sum of £ , when he shall attain the age of twenty-one years. And I direct, that the said legacy shall not vest in or be paid to him unless he shall attain the said age. [*See note Legacies, (12).*]

Condition-  
al legacy.

**XXIII.** I give and beneath to my sister Elizabeth, if at the time of my decease she shall not have attained the dignity of ( ) the sum of £ , of lawful money of Great Britain. [*See note Legacies, (10).*]

Declaration  
that wife  
and children  
shall have  
preference.

**XXIV.** And I expressly declare, that the provision hereby made, or which I may hereafter make by any codicil or codicils to this my will, for the benefit of my wife and children, shall be paid, assigned, and transferred to or for the benefit of her and them respectively, pursuant to the terms of this my will, in preference to and before any of the legacies bequeathed

by me to any other person or persons. [See note *Legacies*, (4).]

**XXV.** And I declare that the bequests and Legacies to children in addition to of any one or more of my children, shall not be portions or advanced considered as revoked or deemed by any portion given by me in marriage to any one or more of my children, or by any advancement made by me to him, her, or them, and any such portion or advancement shall not be considered in lieu of, or in satisfaction for the bequests and legacies given to him, her, or them by this my will or by any codicil or codicils thereto. [See note *Legacies*, (8).]

**XXVI.** I direct that the said several legacies, Directio : a together with interest for the same from the day of my death, shall be paid within six calendar months next after my decease, if the said legatees respectively shall then be of age, or as soon afterwards as they shall respectively attain such age: And I desire that such of the legacies hereinbefore given, which shall not have then become payable under this my will, may be laid out in some or one of the public funds or parliamentary stocks of Great Britain, to accumulate for the benefit of the legatees who shall respectively be entitled thereto; with full power for my said executors hereinafter named

F

As to invest-  
ment in the  
funds for  
the benefit  
of legatees.

or the survivor of them, or the executors or administrators of such survivor, to pay or apply the dividends and interest thereof respectively, or so much thereof as they or he may think proper, towards the maintenance or education of such legatees.

Direction  
preventing  
the lapse of  
a legacy.

**XXVII.** And I do hereby expressly direct, in case the said G. H. shall depart this life before my decease, that the said legacy hereinbefore given to him shall not thereby lapse: But in such case I do hereby give and bequeath the said sum of £ , to the executors or administrators of the said G. H. to be held and applied by them as part of the personal estate of the said G. H. [See note *Legacies*, (6).]

Bequest of  
specific le-  
gacy.

**XXVIII.** I give and bequeath to A. B. of &c. the sum of £ , 3 per cent. Consolidated Bank Annuities, now standing in my name in the books of the Governor and Company of the Bank of England. And I direct that the said legacy shall be deemed a specific legacy. [See note *Legacies*, (2).]

Direction  
that a parti-  
cular legacy  
shall not be  
specific.

**XXIX.** I give and bequeath to C. D. of &c. the sum of £ , 3 per cent. Consolidated Bank Annuities, now standing in my name in the books of the Governor and Company of the Bank of England: And if it shall happen

that I shall not at the time of my decease be possessed of that amount of 3 per cent. Consolidated Bank Annuities, then I direct my executors to purchase or make up the same out of my personal estate, and to transfer the same to the said C. D. for his own absolute use. [See note *Legacies*, (2).]

XXX. I give and bequeath to my son John Bequest of six of my American Bank shares, for his own use, <sup>particular</sup> legacy to be and I direct the same to be transferred to him <sup>made good</sup> accordingly: And if I should sell any of my <sup>to legatee</sup> if disposed American Bank shares in the life-time of my <sup>of by tes-</sup> said son, I direct that the amount of the same shall be made good to him: And I accordingly hereby give and bequeath to him the amount of the same. [See note *ib.*]

XXXI. I forgive C. D. the debt of £ <sup>Release of</sup> which he owes to me, and I direct my executors <sup>a debt.</sup> to deliver up the bond, whereby the same is secured, to be cancelled: And I direct that this bequest shall not be considered as a personal legacy, or as intended for the benefit of the said C. D. only, but that in case the said C. D. shall die in my life-time, his representatives shall have and be entitled to the benefit thereof. [See note *Legacies*, (7).]

XXXII. Whereas my son James is indebt- <sup>Mortgage</sup> debt releas-

ed on cer-  
tain condi-  
tions.

ed to me in £ , and interest, secured by mortgage of, &c.: Now, in case he shall settle the said lands to the same uses as the lands herein-after firstly devised do ~~by~~ virtue of the herein-after-recited indenture of settlement and this my will stand settled and limited, Then I authorize and direct my said executors, to release my said son James, and exonerate the said lands so mortgaged to me as aforesaid, of and from the said mortgage debt of £ , and all interest which shall be due for the same: And to join in conveying and settling the same lands to the uses aforesaid: And if my said son James shall refuse to settle the said mortgaged hereditaments to the uses and in the manner in which I have hereinbefore directed the same to be settled, I direct my executors to proceed for the recovery of the said sum of £ , and the interest thereof; or to foreclose the equity of redemption of the hereditaments charged with the payment thereof: And to lay out the said sum of £ , if the same shall be recovered, in the purchase of freehold or copyhold lands of inheritance; and to settle the lands so to be purchased, if any such shall be purchased, or the lands so to be foreclosed, if the same shall be foreclosed, to the uses and upon the trusts which, under and by virtue of the said indenture of settlement, and this my will, shall at the time of my de-

cease be subsisting or capable of taking effect in the hereditaments comprised in the said indenture. [See notes "Legacies," (10); "Election."]

XXXIII. I give and bequeath to A. B. the Legacy not sum of £ . And I do hereby direct that to be in satisfaction of the legacy given by this my will, to the said A. B. shall not be, or be taken to be in full or in part satisfaction of any sum or sums of money in which I now am, or at the time of my decease may be, indebted to the said A. B. [See note *Legacies*, (5).]

XXXIV. And whereas I have a certain Bequest of sum of 3 per cent. Consolidated Bank Annuities, in the names of W. B. and G. H.; And the sum of £ West India Dock Stock, in the names of the said W. B. and G. H.: And the said 3 per cent. Consolidated Bank Annuites and West India Dock Stock are subject to certain trusts, which I have declared of the same to the persons in whose names the same now stand: Now I declare, that, subject to the aforesaid trusts, the same 3 per cent. Consolidated Bank Annuites and West India Dock Stock shall be the property of, and I hereby give the same to A. B. of, &c.; And I forthwith declare my intention, that as soon as conveniently may be after my decease, the same

3 per cent. Consolidated Bank Annuities and West India Dock Stock, shall be transferred to the joint names and account of the said W. B., G. H., and A. B. [See note *Legacies*, (2).]

**Bequest to servants.** XXXV. I give and bequeath to each of my servants, both in town and country, who at the time of my decease shall have been in my service for      years and upwards, one year's wages over and above the wages that may then be due to them respectively. [See note *Legacies*, (10).]

**Charitable legacy.** XXXVI. I give the sum of £      unto or for the benefit of      hospital, in

As to devise in Mortmain and to charitable uses. \* There is no restriction whatever upon a testator leaving personal estate to charitable purposes, provided it is to be continued as personality; and the executors or trustees are not obliged by the will to lay it out in land.

The stat 9 Geo. 2, c. 36, commonly, though improperly, called the mortmain act, has been mentioned as a barbarous act. It is, says Lord Hardwicke, quite otherwise, far from being a prohibition of charitable foundations, it only restrains the method, leaving the disposition thereto of personal property free. The particular views of the legislature were two—first, to prevent the locking up land and real property from being aliened, which is made the title of the act; the second, to prevent persons in their last moments from being induced to give away their real estates from their families. This was a very wise object, for, in times of popery, the

**XXXVII.** I give and bequeath the sum of £ unto the managers and trustees of

Ibid.

clergy got almost half the real property of the kingdom into their hands, and indeed, I wonder, continues his lordship, they did not get the rest, as people thought they thereby purchased heaven. As to the other view, it is of the last consequence to a trading kingdom, to which the locking up of lands is a great discouragement. *Attorney-General v. Day*, 1 Ves. 218. In this country a portion of the residue of every man's estate was formerly applied to charity, and the Ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator. 7 Ves. 69.

The statute 9 Geo. 2, c. 36, provides that no manors, &c. or other hereditaments corporeal or incorporeal, and that no money, securities for money, &c. or personal estate to be laid out in the purchase of lands, &c. shall be given or settled in trust, or for the benefit of any charitable uses, except by deed executed a year before the death of the grantor, and enrolled within six months after execution, or (as to stocks in the funds) registered within six months before the death of the donor. The two Universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster are excepted. (Though the number of advowsons was limited, this restriction has been repealed by 45 Geo. 3, c. 101). The statute also enacts that all gifts, conveyances, and settlements whatsoever of any lands, tenements, or other hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, or to, or in trust for any charitable uses whatsoever, which shall at any time be made in any other manner or form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void."

This act is applicable only to England, being an act of local policy. In its causes, objects, provisions, qualifications, and ex-

the charity school in , for the use and benefit of the said charity school. And I

ception, it is a law wholly English. *Attorney-General v. Stewart*, 2 Meriv. 156. Nor does the act apply even to Scotland. *Olipphant v. Hendrie*, 1 Bro. C. C. 571. *Mackintosh v. Townsend*, 16 Ves. 330.

A bequest of money, due on mortgages in fee, was, in the case of *Attorney-General v. Meyrick*, 2 Ves. 44, which was the first decision on the subject, clearly held to be void. The meaning of the statute is that a testator shall not give to a charitable use that which is or may be a charge on land, though not so at the time of the gift. And Lord Hardwicke afterwards decided that terms for years, being terms in gross, were both within the intention and words of the statute ; his Lordship declared, he would not construe the statute by the chicane by which the former statutes of Mortmain had been construed ; and he observed that it was a reproach to the law that such construction had been put upon them, as prevented their intended effect. *Attorney-General v. Graves*, Ambl. 156. A bequest of mortgages for years is also void, being an interest in land. *Attorney-General v. Caldwell*, Ambl. 635. The disposition of the courts is to give an extensive construction to this statute, so as to comprehend property that in any manner partakes of the nature of real estate. Thus, a bequest of money due on mortgage of turnpike tolls is void ; so is a bequest of money secured by assignment of poor rates and county rates. That part of the poor rates which is raised out of personal property cannot be distinguished, or the security apportioned as to a certain part as being the produce of land, and as to the remainder as arising from personal property ; such securities therefore cannot pass : otherwise something in the nature of real property would go to the charity. *Knapp v. Williams*, 4 Ves. 340 (*n*). *Finch v. Squire*, 10 Ves. 41. *A fortiori*, a legacy charged on real estate is void. *Currie v. Page*, 17 Ves. 462. So a legacy to the trustees of an institution, to be applied by them towards the discharge of a mortgage on the property, is void. *Corbyn v. French*, 4 Ves. 418.

In the case of *Vaughan v. Farrer*, 2 Ves. 181, Lord Hardwicke

direct that the receipt of (two or three) of such managers or trustees shall be a sufficient discharge to my executors for the same.

employed a laboured argument, to shew that a clause in a will, directing that trustees should "erect" an hospital, was not contrary to the construction of the statute; and his Lordship considered, that "erect" imports as well founding as building, as *erigimus* is construed in charters of the crown and private foundations; and therefore he considered the direction, as not requiring that the money should be laid out in *building* an Hospital. This doctrine, which also governed the decision in *Attorney-General v. Bowles*, 2 Ves. 547, has, however, been long over-ruled, and it is now held, that the term *erecting* means, as applied to charities, the substantial part of the gift, not merely the building of any hospital, &c. The first case in which that authority was impeached was the *Attorney-General v. Tyndall*, Ambl. 614, in which Lord Henley considered the decision as contrary to the spirit of the statute, and that such construction would be opening a door to avoid it; and again in *Pelham v. Anderson*, cited 1 Bro. Ch. Ca. 444, it was determined that a bequest of 2000*l.* to *build and erect* an hospital was void. In the case of the *Attorney-General v. Hyde*, Ambl. 751, the bequest was for *erecting and building* a free school. There was in the parish a piece of ground in Mortmain, upon which a school had formerly been erected; it was contended, that this circumstance was in the testator's contemplation, and that the intention was to re-erect the school on that foundation; but the court held, that *as the testator had not himself pointed out that intention*, it could not be presumed. In *Foy v. Foy*, 1 Cox, 163, the proposition is laid down, that where the gift is for *erecting and endowing* a school or hospital, there the court implies, that a purchase is to be made. In that case the testator gave 1000*l.* towards the erection and endowment of an hospital, in aid of a subscription for that purpose. Lord Kenyon, then Master of the Rolls, referred it to the master, to enquire whether there was an hospital. The next clause in the will was, "I give 800*l.* for the purpose of erecting and endowing a school." This clause

*Ibid.* **XXXVIII.** I give and bequeath to the Treasurer for the time being of the school for

was declared void; and Lord Kenyon said, he should have declared the other void also, if there had not been an hospital existing. In *Attorney-General v. Nash*, 3 Bro. Ch. Ca. 588, Lord Thurlow held a bequest to erect and build a school-house, to be altogether void; and it appears, from what is advanced in 8 Ves. 191, that it was his Lordship's opinion, if a testator direct a school to be built, and should not himself advert, by words in his will, to the land being acquired, otherwise than by purchase, it must be inferred, that he meant it to be acquired by purchase, and then it will not do. And in *Chapman v. Brown*, 6 Ves. 404, the direction was for the purpose of *building or purchasing* a chapel, and it was admitted on all hands, that the bequest to purchase was void; and as it had been determined by the preceding cases that a bequest for the purpose of building was equally void; therefore the whole trust fell to the ground. In *Attorney-General v. Parsons*, 8 Ves. 186, the bequest was for rebuilding, repairing, altering, or adding to the alms-houses, the word or giving a discretion to employ the fund in either way, the Lord Chancellor thought he was at liberty to confine it to the former alternative alone. It is now, therefore, settled, that if a testator give personal property, to erect or endow a school or hospital, it must be considered, unless it be otherwise declared, that it was his intention that land should be acquired and buildings made, as necessary parts of his purpose; but if he expressly direct that the bequest shall not be applied in the purchase of lands, or the erection of buildings, then, although the expectation of the testator, with respect to the purchase of lands and buildings by other persons should be wholly disappointed, yet the charities would be considered as established, and the trustees would have a title to the money from the death of the testator, and must apply it in the maintenance and support of the charities. The doctrine, that a bequest of money for the improvement of land already in Mortmain is bad, (*Attorney-General v. Tyndall*), has been over-ruled by subsequent cases. See *Harris v. Barnes*, Ambl. 651. *Attor-*

the Indigent Blind, in , the sum of £ , to be applied towards the purposes

*ney-General v. The Bishop of Oxford*, 1 Bro. C.C. 444 (*n*). *Attorney-General v. The Bishop of Chester*, Ib. *Brodie v. Duke of Chandos*, Ib. (*n*). *Attorney-General v. Parsons*, *supra*. The principle formerly advocated, would, if pushed to its extent, prohibit all repairs or improvements of existing buildings. *Henshaw v. Atkinson*, 3 Madd. 306. *Attorney-General v. Nash*, 3 Bro. C.C. *supra*. Where negative words are used, shewing the intention to be, that the money should not be applied to purchase or keep in repair any real estate, and where it appears that the bequest is intended to form an auxiliary fund to go in aid of other donations, such bequest will be good. But it is settled, that if a legacy be inseparably connected with the primary gift, which is a devise of land, and therefore void by the statute, the legacy must also fail. On the other hand, if it can in any way be separated from the devise, it will stand. *Attorney-General v. Hinckman*, 2 Jac. & W. 270. *Waite v. Webb*, 6 Madd. 71.

A testatrix directed her executors to invest a sum of money, part of her personal estate, in government funds or securities, to certain persons as trustees, and directed that the trustees should pay, apply, and dispose of the interest and dividends of such funds, &c. first, in paying the expenses of providing a proper school-house for the instruction of twenty-four girls, such expense of providing a school not to exceed the annual interest and dividends of so much of the stocks, as, at the time of the investment, should be of the value of 600*l.* and in the next place of clothing the said twenty-four girls, each of whom was to have two suits of clothes, at or upon their election, or entrance on the foundation of the said school. A salary of 40*l.* a-year was also to be paid to a mistress, to be nominated and appointed by the said trustees. Various other directions were given as to the management of the school, and the testatrix ordered that the trustees of the said funds, and the churchwardens and overseers of the parish for the time being, should

of the institution; and I direct that the receipt of the person who shall be treasurer of the

be the directors and managers of the said school for ever. It was decided by the court, that with respect to the school, the single question was, whether, to execute the proposed purpose of the testator, land *must* be purchased for erecting a school. The testatrix had directed only that a proper school-house should be *provided*, which might be by hire, and that it was some evidence of her intent that land should not be bought, that the trustees were only to apply the dividends, and no part of the principal, to the expense of providing a school-house. If she meant the charity to continue for ever, that intent might be executed without necessity for the purchasing of land. *Johnston v. Swann*, 3 Madd. 457.

It therefore appears to be established that if a testator be desirous of founding any charitable institution, his desire may be frustrated, unless he expressly direct that the money shall not be applied in the purchase of lands, or the erection of buildings, but that he expects other persons will, at their expense, purchase the necessary lands and buildings; for where the principal intent is to effectuate the charity, the intent will be satisfied, by the land coming *aliunde*.

Words certainly might be accidentally introduced into a charitable bequest, which might justify the court in taking the case out of the statute; but it is more prudent to rely on an express declaration, than on incidental expressions.

The purposes must be charitable.

The legal signification of the word charity, and the technical sense in which the word is used, are derived from the statute 43 Eliz. c. 4; and those purposes are considered charitable which are enumerated in the statute, or which are deemed to be within its spirit and intentment. The expression, charitable purpose, has been applied to many acts described in the statute, and to such as are analogous thereto, not because they can with propriety be called charitable, but because that denomination is by the statute given to all the purposes therein described.

A bequest has never been held charitable, where the testator

said institution at the time when the above legacy is paid, shall be a sufficient discharge to my executors.

has not either used that word to denote his general purpose, or has not specified some particular purpose which the court has determined to be charitable in its nature.

Where a charitable purpose is expressed, however generally, and the substantial intention is charity, whether a particular or general object be pointed out, (provided it can be seen what the purpose is), the bequest will not fail on account of the uncertainty of the object ; but means will be found of effectuating the general intention, and the particular mode of application will be directed by the court, charity being the essence and substance, and the mode only a shadow. Where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual ; but where the execution is to be by a trustee, with general, or some objects pointed out, there the court will take the administration of the trust. And where originally a trust is created for the distribution of a charity, and the trust is not carried into execution, the object being indefinite, the court will execute it by a scheme. The death of the trustee in the life of the testator will make no difference, for the court will still carry on the charitable intent of the testator, and will exercise the discretion which might be left to the trustee. The substance of the charity would remain, notwithstanding the death of the trustee ; and though at law the legacy would be lapsed, yet in equity it would still subsist. *Attorney-General v. Herrick*, Ambl. 712. *Attorney-General v. Peacock*, cited *Ib. Moggridge v. Thackwell*, the great case on the subject of charity and in which the authorities are stated by the Lord Chancellor, 7 Ves. 36. *Bishop of Hereford v. Adams*, 7 Ves. 324. *Cary v. Abbot*, 7 Ves. 490. *Morice v. Bishop of Durham*, 9 Ves. 399, *Ib.* 10 Ves. 522.

If the charity cannot take place according to the letter, it will be performed *cy-pres*, and the substance pursued. 2 Treat. Eq. 219. As to the application of the doctrine of *cy-pres*.

The doctrine of cy-pres, a strange doctrine, (as it has been termed), will authorize the court to apply a charitable bequest to purposes not expressly pointed out by the will, as for the instructing and apprenticing of children, instead of the fund being expended according to the will of the testator solely in money, provisions, physic, or clothes. It is evident, that by this means, the claims of the legal representatives of the testator, who would be entitled to the fund, must be disappointed. *Bishop of Hereford v. Adams*, 7 Ves. 324. *Attorney-General v. Hurst*, 2 Cox, 365. *De Costa v. De Pas*, *infra*. Thus, should the purpose contemplated by the testator be contrary to law, and the mode in which the money was intended to be applied such as cannot by the law of England take effect; yet where the bequest is to a charity, the crown, by sign manual, directed to the Attorney-General, may give orders as to the charitable manner in which the money shall be disposed. The courts have arrived at such determination upon this principle; that the intention of the testator being charitable, it should be carried into effect by another mode; his charitable intention ought not to be disappointed, though disapproved by us, but we are to make him charitable in our way, and upon our principle. Although disapprobation of such proceeding has been expressed by many judges, and particularly by Lord Thurlow, who said it was very hard indeed that the court should give money to other charities, because those that were mentioned could not take (1 Ves. jun. 469), yet the doctrine is well established by a long series of cases. A Jew, by will, dated 1739, bequeathed a fund to be appropriated towards establishing a *je-suba* or assembly for reading the law and instructing the people in their religion. The money was directed by the sign manual to be disposed of to the Foundling Hospital. *De Costa v. De Pas*, Ambl. 228. The court sees a general intention for charity in these cases, yet I think, says Lord Eldon, in *Moggridge v. Thackwell*, 7 Ves. 81, it is very difficult, where it was the intention of the testator to establish a Jewish Synagogue, to discover an intention to build a Foundling Hospital, rather than that the money should not be applied. But if the purpose be unlawful, the cases certainly authorize the court to say, the fund shall be applied to

some other charitable purpose, and then it devolves upon the crown as *parens patriæ*. However, it would seem, although a charitable purpose be expressed, that if such charitable purpose be coupled with an authority to the trustees or executors, to apply the fund as they should think fit; such discretionary power will be considered as sufficiently disjunctive, to prevent the operation of the before-mentioned rule. It is presumed that the case of *Vezey v. Jamson*, 1 Sim. & Stu. 69, was decided upon this principle; John Vezey, by will, gave the residue of his personal estate to his executors, upon special trust and confidence, to dispose of the same to *such charitable* or public uses or purposes, person or persons, or otherwise, as he might, by codicil to his will, or by memorandum in his own handwriting appoint, and as the laws of the land would admit. And in default of such direction or appointment, upon trust, to pay and apply the same in or towards *such charitable* or public purposes as the laws of the land would admit, "or to any person or persons, and in such shares, manner, and form as his executors should in their discretion, will, and pleasure, think fit, or as they should think would have been agreeable to him, and as the laws of the land would not prohibit, but admit of." The testator did not, by any codicil or memorandum, specify any purpose to which the residue was to be applied. It was considered by the Vice-Chancellor, that the testator had not fixed upon any part of the property a trust for a charitable use. And his Honour decreed that the purposes of the trust were too general and undefined to be executed by the court, and that they must fail altogether. The case is reported briefly, as it appears that the hearing took place previously to the learned reporters entering upon their task. But if the distinction already suggested, be properly drawn, this case will be in accordance with the established authorities, although it must be confessed, a difficulty arises as to the observation attributed in the report to the Vice-Chancellor, "that the testator had not fixed upon any part of this property a trust for a charitable use."

Objects of liberality and benevolence do not mean the same as objects of charity. That word, in its widest sense, denotes all the good affections men ought to bear towards each other; in its

most restricted and common sense, it means relief of the poor. Liberality and benevolence include charity, but they are not convertible terms. *Purposes of liberality and benevolence* are therefore too indefinite to authorize an application of the fund to any charitable purpose. A testatrix bequeathed all her personal estate to the Bishop of Durham, his executors, &c. upon trust, to pay the residue to such objects of benevolence and liberality as the bishop in his own discretion should most approve; and she appointed the bishop her sole executor. The trust was too indefinite to be disposed of to any charitable or other purpose; and as the bishop was a trustee, and could not take for his own benefit, it was decreed that the residue should be distributed among the next of kin of the testator. *Morice v. The Bishop of Durham, supra; et vide James v. Allen, 3 Meriv. 17.*

As to the objects who may be benefited by bequest. A testatrix bequeathed a personal fund for the purpose of putting out "our poor relations" apprentices; afterwards, by a codicil, she confined it to two families. It was contended, that this bequest could not be supported as a charity; but Sir William

Grant said, such cases might be supported as charities, that it should be executed as far as it could, and he did not know why those children who were ready, might not be put out apprentices. *White v. White, 7 Ves. 423.* So also, a legacy to the "poor inhabitants" of a particular parish was sustained, and a scheme decreed to be laid before the master for distribution. In such cases, the court forms a judgment upon taking all the circumstances into consideration, and inclines in favour of the disposition *ut res magis valeat. Attorney-General v. Clarke, Ambl. 422.*

A bequest to "the widows and orphans" of a certain parish, was held to be a good charitable bequest, and was construed as if the expression had been to the *poor* widows and orphans of the parish. *Attorney-General v. Comber, 2 Sim. & Stu. 93.*

A testator devised real estate to trustees in trust, to sell, and directed the money arising from such sale, and from the sale of his personal estate and effects, to be laid out in the funds, and gave the following directions as to the application of the dividends, after payment of certain annuities, &c. "I do hereby direct, that as soon as conveniently may be, after my decease, a

proper and commodious house shall be taken by my trustees on lease or otherwise, at such yearly rent as shall be agreed upon, and fitted up for a school for the reception and education of the children and grandchildren of my relations, [naming them], as they shall respectively attain their age of seven years. I will and direct that my said trustees shall place and clothe them in the school, &c. until their age of fourteen years, and then put them out as apprentices, &c.; and that my said trustees shall also admit and take into the said school such number of boys and girls (the boys being two to one of the girls) as the yearly income of my trust stock from time to time will be sufficient to educate, after payment of rent, &c. the salary of masters and mistresses, &c." The testator then gave several regulations for the charity, and made the trustees executors. It was held, that the devise and bequest were void, as a devise for the general purposes of establishing a charity, but that the children and grandchildren of the several persons named in the will were entitled to the benefit of the dispositions made in their favor by the will, so far as the objects were not too remote. It was declared that the devise and disposition contained in the said testator's will (except as aforesaid) were to be considered a trust for the said testator's heir and next of kin. The trustees were ordered to lay a plan before the master for educating the persons who were objects of the testator's bounty, (so far as the disposition made by the testator was a valid one under the declaration aforesaid), and for placing such persons out apprentices, &c. The master was ordered to ascertain who were the objects of the testator's bounty, according to the above declaration, and under what right they claimed. *Blandford v. Fackerell*, 4 Br. Ch. Ca. 393. No doubt the children and grandchildren in this case took, as particular objects of the testator's bounty named in the will, sustaining a certain character as children and grandchildren, and not in the character of persons benefited by a charity. The gift for their benefit was therefore separable from the charitable purpose contemplated by the testator.

The question, who is entitled to the property comprised in a As to the parties enti-

tled to the bequest, void by the statute, includes, so far as the heir at subject of a law is concerned, the doctrine as to the conversion of real into bequest, personal estate, which is the subject of a separate note, and to void by the which the reader is referred. In the note "Residue," the claims statute.

of the residuary legatee are also considered. But it is desirable, here, to state a few of the cases for the purpose of explaining the claims of the representatives; and also, in order to lay down the leading principles which govern the decisions.

It is an important and leading feature in all these cases, that if a testator have certainly intended to create a trust with respect to a charitable bequest, a trust shall attach to the fund, although the object of the bequest may fail. The party taking under the will cannot claim the property for his own benefit, in as much as it is the subject of a trust reposed in him, and therefore could not have been intended as an absolute gift to him. In fact, he is only the person selected to make the distribution of the fund. But where a gift is not in trust, and the application of the money is discretionary in the individual, he will be held to take absolutely for his own use and benefit.

A trust being clearly intended, then it is to be observed, that a will as to personal estate, having reference to the death of the testator, the residuary legatee will be entitled to take whatever may be considered as undisposed of by the will, or may become undisposed of at the death of the testator. But a will, as to real estate, having reference only to the time of making it, a residuary devisee of real estate or of the price of real estate, is entitled only to what was at that time intended for him. A testatrix bequeathed all the rest and residue of the money arising from the sale of her estates, and all the residue of her personal estate, after payment of her debts, legacies, funeral and testamentary expenses, to her trustees and executors, to be disposed of unto such person and persons, and in such manner and form, and in such sum and sums of money as in their discretion they should think proper and expedient. According to the principle before laid down, no trust being affixed to the fund, and the power of disposition being purely arbitrary and discretionary, which no court could either direct or con-

trol, and no charitable purpose being expressed, the court declared that neither the heir nor the next of kin had a right to call upon the executors to account for this residue. Such part of the real estate as was given to charitable purposes, was decreed to belong to the heir at law. *Gibbs v. Rumsey*, 2 Ves. & Bea. 294.

Where real estate is directed to be converted into personal, for a purpose which wholly or in part fails, though the estate has been converted, the produce of that conversion will wholly or in part, according to the failure of the purpose, still be real estate, and will belong to the heir. Whenever any portion of the real estate is left undisposed of, it must belong to the heir; and to exclude him there must be an intention, not only that the heir should not take, but some other person who is to take, must be pointed out. *Ackroyd v. Smithson*, 1 Br. Ch. Ca. 503. The general rule is, that where property is given for particular purposes in trust, nothing more is subject than those purposes require; and if not exhausted, there shall be a resulting trust for the residue, after the purposes are answered as to the real estate for the heir at law, as to the personal for the personal representatives. *Robinson v. Taylor*, 1 Ves. Jun. 44. In case of lapse of real estate, the heir at law takes; but in the case of personal property, the residuary legatee is preferred either to the next of kin or the executor. 9 Ves. 25.

A testator, after bequeathing a legacy to his executors, devised a copyhold estate to A.B., the said A.B. causing to be paid to his executors the sum of 1000*l.* After payment of debts, &c. the residue of the estate and effects was bequeathed to the Governors of the Foundling Hospital and their successors, for ever. The question was, to whom the 1000*l.* should go? It was bequeathed to the executors as part of the personal estate for the benefit of the charity, but the law could not allow it to go to the charity. The executors could not take for their own use, as a legacy was bequeathed to them [*see note "Residue."*]. As to the devisee of the copyhold, the charge was lawful, and he was obliged to pay the money to the executors, as the money was well charged on the estate. The next of kin were not entitled,

because, if it was turned into personal estate, it would go to the Governor, and no part of the personal estate was undisposed of. The heir at law, therefore, was held to be entitled by way of resulting trust, because the 1000*l.* was mentioned by way of condition on the devisee of the real estate, and was to be paid to the executors; if wanted for debts, it would vest, and must be admitted by the executor for that purpose only, to be turned into personal estate. But the statute prevented such transmutation for the benefit of the Hospital, and therefore it remained part of the real estate undisposed of by the will. It was therefore decreed, that as the charge was well made on the real estate, but not well disposed of, by reason of the act, it was part of the real estate undisposed of, and remained for the benefit of the heir. *Arnold v. Chapman*, 1 Ves. 108.

Where a testatrix directed her trustees to sell her real estate, and out of the monies produced by the sale to pay certain legacies, and then to lay out the sum of 800*l.* in landed property to be settled for charitable purposes, and gave all the residue and remainder of the monies arising from the sale of her real estate to A.B. for his use and benefit, whom she also made residuary legatee of the real estate; the court held that the devisor at the time of making the will, intended that the residuary devisee of the price of the land should take such residue, subject to the deduction of the 800*l.*, and should not take the 800*l.* This money was therefore declared to be undisposed of, and to result to the heir. *Jones v. Mitchell*, 1 Sim. & Stu. 290.

But where a testator devised all his real estate to trustees, to sell and dispose of the whole, with his personal estate, for the payment of his debts, legacies and performance of his will, and gave several legacies, and among the rest 1200*l.* which was to be applied to charitable uses (but which were within the statute 9th Geo. 2nd,) and the trustees were directed to place out all the residue of his estate and interest therein upon securities, and divide the same among several persons; the question was, whether the 1200*l.* should go to the heir at law, or to the residuary legatee: Lord Hardwicke held that the money which should arise by sale of the real estate was turned into personal

by the testator, and so intended by him, it plainly appearing that by the description of *all* his personal estate, he meant to include the whole in the residue, so that it was to be considered as personal. It came to this, a will was made, in which several legacies, and the residue of the personal estate, were given away; one of the personal legacies was void by law; the court could not say for that reason, contrary to the express will, that the testator intended to die intestate; for, giving the residue over, includes every thing, whether it fall in by reasns of a legacy being void or lapsing by death in the life of the testator. The 1200*l.* was therefore adjudged to belong to the residuary legatees. *Durour v. Motteux*, 1 Ves. 320. In this case, the devisor included the residuary price of the land in the general gift of all his personal estate, and therefore it was held, that it was the purpose of the testator that it should pass as his residuary personal estate would pass, and that upon the construction of the will, the real estate was converted into personalty, for all the purposes of the will, including the residuary bequests. This case therefore does not decide the question which would have arisen, if there had been no residuary disposition; or if such residuary disposition had been confined to what was personalty at the testator's death. See *Mr. Cox's note, Cruse v. Barley*, 3 P. Wms. 22.

In *Vezey v. Jamson, supra*, the trusts were considered too general and undefined to be executed by the court. The executors taking the residue with a trust attached thereto, and the same being personalty, it was held that the next of kin were entitled.

Where a testator, after giving various legacies, some of them to public charities, and also after giving to his executors as such, one hundred guineas each, declared as follows, "in case there is any money remaining, I should wish it to be given in private charity." As the executors had legacies given to them, it was evident that the testator intended that they should discharge the duties of the office, and should not take the residue [*see note "Residue"*]; consequently, the question rested entirely between the next of kin and the crown. The object to which the fund was to be applied, was of a general indefinite nature. The court

could not take upon itself the execution of a trust, as there was nothing to act upon, neither a general nor particular object was pointed out. A trust could not be discovered from the expression "I desire it may be given in private charity." The executors were declared to be trustees for the next of kin, of the general residue of the testator's personal estate. *Ommanney v. Butcher*, 1 Turner, 260.

If money for the benefit of a charity be charged upon real estate, devised to a particular person, the money will sink into the land in favour of the specific devisee, to the exclusion of the heir at law, or residuary legatee, or next of kin. *Wright v. Row*, 1 Bro. Ch. Ca. 61.

As to marshalling assets in favor of a bequest to a charity. The reason of marshalling assets is always *ut res magis valeat quam pereat*. As where there are general legacies charged on real estate, if the personal estate is not sufficient to pay the whole,

the legacy to the charity shall be paid out of the personal estate, and the rest out of the real. So, where there is a particular disposition of the different species of estate, enumerating them, and in the devise of the residue one of them is left out, that part shall be applied first. So, where there is a charge on the real estate, and part of it is left undisposed of, and descends, that part shall be applied first. The court will not set up a new rule of marshalling assets, in order to defeat and avoid the statutes of mortmain, yet the old rules may and ought to be applied as before those statutes. Therefore, where a term of years and other personal estate was devised to trustees for charitable purposes (which, as respects the leasehold estate, would be void), Lord Hardwicke directed that the leasehold should be first applied to the payment of the debts and legacies; and as there were more debts and legacies than the leasehold estate would pay, it was ordered to be sold, and the deficiency to be made up out of the other assets, and the rest to be applied to the charity. *Attorney-General v. Tomkins*, Ambl. 216. But the assets cannot be so marshalled to support a legacy contrary to law. *Mogg v. Hodges*, 2 Ves. 52. *Arnold v. Chapman*, 1 Ves. 108. *Attorney-General v. Graves*, Ambl. 155.

Custom of London. A citizen of London may, by the custom of London, devise

land situate in London in mortmain; but he cannot devise land out of the city in mortmain. *Middleton v. Cater*, 4 Br. Ch. Ca. 409.

The law so far favors Protestant Dissenters upon the foundation of the act of toleration, that charities are permitted to be established for the support of their ministers. As in the case of the *Attorney-General and Cock*, 2 Ves. 273, Anne Partridge, by her will, devised an annuity to the minister of a baptist meeting-house, in the parish of Hemel Hempstead. On an information in the name of the Attorney-General, to establish this charity; it was urged, that the act was not merely an act of toleration, but that it restored the common right of mankind to worship God according to their own consciences, and was agreeable to the policy of inviting people to come to trade and live here, and to the policy of every man's disposing of his own as he pleased. The case of the *Attorney-General and Andrews*, was cited, wherein copyhold lands, not surrendered to the use of the will, were devised for the benefit of Quakers, which the Lord Chancellor established. On the other hand it was argued, that the court, before it interposed for a charity, would consider its nature, and not execute every charity, although made on religious principles; and the case of *De Costa against De Pas, supra*, was quoted as an authority for the position. But Sir John Strange (Master of the Rolls) said, that as to the charity itself, whether it were such as the court would think it reasonable to aid, in order to carry it into execution, it seemed, on the authorities cited, that it was not to be made a question. The Baptists were persons the legislature had thought proper so far to countenance as a denomination of Christians, as to extend the toleration to them, standing on the same footing as Quakers and other species of dissenters. If, therefore, the court had established it in case of a provision for Quakers, there was no reason why a difficulty should be made to give Baptists the benefit of the provision. In the Quakers' case, the court went a great way, not only countenancing it as a good charitable use, but supplying the want of surrender to the use of the will. The Jew case was different, the Lord Chancellor refused to carry it into execution, because it was not for the support or encouragement of any denomination of Christians

As to Pro-  
testant Dis-  
senters.

whatever, but for the propagation of the Jewish law in contradiction to the Christian religion, which is part of the law and constitution of the kingdom. Therefore, a bequest of personality, in trust for the benefit of a dissenting congregation, whether Quakers, Baptists, or others, is good.

Institutions of such nature are in the nature of charities for religious purposes, calling, as such, for the interference and protection of the court. In the *Attorney-General v. Pearson*, 3 Meriv. 353, Lord Eldon stated that the court was unquestionably bound to administer a trust for the benefit of a Protestant dissenting congregation. If land or money were given (in such a way as would be legal, notwithstanding the statutes concerning dispositions to charitable uses) for the purpose of building a church, or a house, or otherwise, "for the maintaining and propagating the worship of God;" and if there were nothing more precise in the case, the court would execute such a trust by making it a provision for maintaining and propagating the established religion of the country. It is also clearly settled, that if a fund, real or personal, be legally given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant dissenters, promoting no doctrines contrary to law, although such as may be at variance with the doctrines of the established religion: it is then the duty of the court to carry such trust into execution, and to administer it according to the intent of the founders. Nevertheless, I take it, continued Lord Eldon, from the experience of many years in this court, that if any body of persons mean to create a trust of land [by deed] or of money, in such manner as to render the gift effectual, and to call upon this court to administer it according to the intent of the foundation, whether that trust has religion for its object or not, it is incumbent on them, in the instrument [or will] by which they endeavour to create that trust, to let the court know enough of the nature of the trust to enable the court to execute it; and therefore, where a body of Protestant dissenters have established a trust without any precise definition of the object or mode of worship, I know no means the court has of ascertaining it, except by looking to what has passed, and

**XXXIX.** And I do hereby charge all Bequest of the manors and other hereditaments firstly annuities. hereinbefore devised, with the annual\* sums

thereby collecting what may, by fair inference, be presumed to have been the intention of the founders. Religious belief is irrelevant, except so far as the King's Court is called upon to execute the trust; but even if it could be made out that the trust was merely for the establishment of a dissenting meeting-house, without regard to any particular tenets, still, that must be qualified by shewing that it was a meeting-house that could be legally sanctioned and established; and in that point of view, the court is bound to consider the question as relevant. *Attorney-General v. Pearson*, 3 Meriv. 353.

By statute 43 G. 3, c. 107, every person is at liberty to give, Queen by deed enrolled, or by will, any real or personal property for Anne's the augmentation of Queen Anne's Bounty.

By the 43 G. 3, c. 108, in like manner, any person may give Building, by deed enrolled, or by will, executed three months before his &c. of church death, five acres of land, or personal property to the amount of or parson 500*l.* for the building or repairing of any church or parsonage-house. If more be given, it may be reduced to that limit by the Chancellor. But a glebe of fifty acres can be augmented by one acre only.

\* The first payment of an annual sum given by will, must, Annuities. in the absence of a particular direction, be made at the end of the year from the death of the testator. Lord Eldon observed, When the in *Gibson v. Bott*, 7 Ves. 96, that as to the period when the first first payment of an annuity was due, he found by a manuscript note, ment of an- that he had inquired from Baron Thompson, when a Master in comes due. Chancery, and from some other masters, who stated that there was no settled opinion upon it, but that the better practice was, to calculate it as payable at the end of a year. They doubted, whether, if a sum of money was directed to be placed out to pro- duce an annuity, it was to be considered as a legacy, payable at the end of a year, or as an annuity payable from the death of the testator. Again, alluding to the same point in the case

hereinafter mentioned ; that is to say, £ to my faithful servant, W. K., during his life ;

of *Fearns v. Young*, 9 Ves. 553, his Lordship said, “ Baron Thompson once told me, that the first payment of an annuity was made at the end of a year, and so I took it; but at that time, the opinion of several of the masters was, that it was not to be paid until two years.”

In the case of *Houghton v. Franklin*, 1 Sim. & Stu. 390, where the testator bequeathed an annuity to be paid monthly, the counsel for the residuary legatees urged the doctrine, that an annuity was not payable until the end of a year after the testator’s death, and therefore that the commencement of this annuity should not take place until such period. But (by Sir John Leach, the Vice-Chancellor) “as a will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it, is to commence from that period, unless there be some circumstances or expression in the will to control that intention.” In this will there was no such circumstance or expression, and his Honour was therefore of opinion, that the payment of this annuity ought to commence from the testator’s death. And again, in *Storer v. Prestage*, 3 Mad. 167, the testator expressly directed that the annuity should commence at the first quarter-day after his death; and it was therefore decided that the annuitants were entitled to a retrospective account of the arrears accrued due from that time.

(2). As to apportionment of annuities.

If the annuitant die before the day of payment arrives, his representatives, or a purchaser from him, are not, unless it be otherwise directed by the testator, entitled to receive the dividends which did not accrue due till the day of payment, next after the death of the annuitant. *Pearly v. Smith*, 3 Atk. 260. *Sherrard v. Sherrard*, 3 Atk. 503. But the apportionment of an annuity, secured as the separate maintenance of a tème covert, has been allowed at law; because, if the payment depended upon her living to the next day of payment, she might not be able to gain credit for necessaries. *Howell v. Hanforth*, 2 Bl. Rep. 1016. Yet, if the quarterly payments (for instance)

£ to Mrs. A. B. during her life; £ to Mary J. during her life; and £ to Sarah J.

were originally prospective payments, by way of maintenance for the ensuing quarter, and not payable at the end of each quarter, in order to discharge the expenses incurred in the three preceding months, that circumstance might make a difference. *Ibid.*

The general rule of court is, that when parties consent to lay out money in stock, they must abide the consequence, as the court will not apportion the interest of money in the funds. *Wilson v. Harman*, Ambl. 279. S. C. 2 Ves. 671. But, however, where a testator, having previously executed a bond for the payment of an annuity quarterly, on the usual quarter days, by his will devised his real estates upon trust, to raise such sums of money for the payment of debts, legacies, and annuities as his personal estate should fall short of paying; and *the court had made an order in the cause*, that the annuities should be paid half yearly, at Midsummer and Christmas, out of certain funds then in court: on the death of the annuitant afterwards taking place between Lady-day and Midsummer, it was directed that an apportionment should be made up to Lady-day (the quarter-day preceding the death of the annuitant). *Webb v. Lord Shaftesbury*, 11 Ves. 361.

It is apprehended that the general rule before mentioned, applies to an annual sum charged by will upon real estate. And where an annuity, as in the text, Clause XXXIX. is charged on land, and the devisee is authorized by the will to purchase a sufficient sum in the public funds to secure the payment of the annuities, and in exoneration of the real estates; no apportionment will be allowed, whether the annuity continue a charge on the real property, or be secured in the stocks.

Dividends in the funds and the rent of land are not due until the last hour of the day on which the payment is appointed to be made, but the interest of money advanced by way of loan accrues due from day to day. It may therefore be apportioned or received at any time between the days of payment.

during her life, and an additional annuity of £ after the death of either of them, the said Mary

From what has been advanced, it is obvious, that if a testator wish to give to the representatives of an annuitant the benefit of the arrears to become due after the day of payment preceding the death of the annuitant, such desire must be particularly expressed in the will.

(3).

As to abatement of an annuity given by will out of personal estate by way of direct bequest or legacy, must in general cases abate in proportion with pecuniary legacies. But in many cases it may be discovered from the particular penning of the will, and the intent of the testator collected from the will, and the relationship and circumstances of the parties, that an annuitant was intended by the testator to be preferred to other legatees. The case of *Alton v. Medlicot*, cited 2 Ves. 416, and 3 Atk. 693, is an authority that an annuitant for life on the personal estate must abate in proportion with other legatees, and that such annuitant is not to be considered as a specific legatee. General Pepper, by his will, gave to A. 140*l.* out of his personal estate, to purchase for her an annuity of 20*l.* a year for her life, if she continued in his service, and if that should not be sufficient, his executor had direction to advance her a further sum to purchase that annuity. Upon a deficiency of assets, it was insisted that A. should abate in proportion with the other legatees. Sir Joseph Jekyll was of that opinion, and ordered she should abate upon the whole sum of 140*l.*

This decision was afterwards followed by Lord Hardwicke in *Hume v. Edwards*, 3 Atk. 693, and the authority of these cases has never been impeached. But in *Lewin v. Lewin*, 2 Ves. 414, the court thought the intention of the testator sufficiently strong to give to an annuitant a priority of satisfaction. It was the governing reason in this case, that the testator had constituted two residues of his estate, the first to be computed after taking out the money for the purchase of the annuity for his wife, the other to be computed after taking out the money for the pecuniary legatees. There was no suggestion that either the

and Sarah, to the survivor of them, during her life. And I direct the said annual sums to be

wife or children had any other provision. It was therefore considered natural, that the testator in making a disposition of his estate should so give it, that their provision should be secured in the first place, and should not depend upon the contingency of his estate producing sufficient funds at the time of his death to satisfy legacies to strangers in blood, though friends to him, or collateral relations. *See note, "Legacies, (4)."* It was therefore decreed, that the annuitant should be preferred. The case was this : the testator having a wife and two children, gave by will an annuity of 120*l.* to his wife during her natural life, payable half yearly, subject to limitations over, if he had a son, &c. and he afterwards directed his executors to purchase, if they could, the said annuity of 120*l.* in government securities of ninety-nine years or some other longer term ; and if they could not do that, his executors were directed to purchase land of 200*l.* a year value, to be settled so as that the said annuity should be to his wife free from taxes ; with remainders over. The testator directed, that if he should leave any child living at his death, his executors should, out of the profits of the residue of his estate, pay to his wife 30*l.* *per annum* for the maintenance of such child. [“ And in case his wife should survive the children he should leave, or the child she should be ensient with at his decease, then his executors should pay to her during life an additional sum of 40*l.* *per annum*, to be paid in the same manner as the 120*l.* was thereby directed and made payable.”] Belt’s Supplement, p. 372.] The testator gave legacies to some collateral relations and friends, and directed all the residue of his estate, both real and personal, to be put out to and for the best advantage for every child, at his death equally to be divided, share and share alike, to be paid to them at their respective ages of twenty-one years, or marriage. Lord Hardwicke considered this as a very strong case, to shew that the annuity and the fund for the security of it were intended by the testator to be preferred to all the other legacies in the will.

The determination of an annuity by the bankruptcy of the annuitant, or the claim of the assignees thereto, seems to depend (4). As to the effect of t!

**paid to the persons to whom they are respectively given, by quarterly payments; and the**

bankruptcy upon the particular ~~exp~~sions used in the will, and on the annuity, being directed to cease and the fund paid over to another person.

A testator gave an annuity for life charged upon real estate, directing that the receipt of the annuitant only, and of no other person, should be a discharge for it, and that he should not alienate the same; and that if he did alienate, it should cease and determine. The annuitant became a bankrupt, and it was held that the annuity ceased by the bankruptcy and bargain and sale of his estate. *Dommett v. Bedford*, 3 Ves. junr. 149.

A testator devised his real and personal estate to trustees, upon trust to sell and to divide or apply the produce to the use of all and every his child or children, &c. and directed that the share of his son of and in his estate and effects, or the produce thereof, should be laid out in the public funds or in government securities at interest by and in the names of his said trustees, &c. during his life, and that the dividends, interest, and produce thereof as the same became due and payable, should be paid by them from time to time into his own proper hands, or on his proper order and receipt, subscribed with his own proper hand: to the intent the same should not be grantable, transferable, or assignable by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and that, upon his decease, the principal of such share, together with the dividends and interest and produce thereof should be paid and applied by his trustees or executors, their heirs, executors, &c. unto and amongst such person or persons as in a course of administration would become entitled to any personal estate of his said son, and as if the same had been personal estate belonging to him, and he had died intestate.

The son became a bankrupt; and the surviving assignee filed a bill for execution of the trusts; and that the estates might be sold, and the residue ascertained, and that he might receive the benefit of such part or share thereof, or of the interest therein, as he should be entitled to as assignee under the commission.

**first quarterly payment thereof to be made at the expiration of three calendar months next**

By the Lord Chancellor.—“ Is the ~~in~~ in this will enough to shew, that, as this interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the commission of bankruptcy? To prevent that, it must be given to some one else; and unless it can be established that this, by implication, amounts to a limitation, giving this interest to the residuary legatee, it is an equitable interest, capable of being parted with. The principal, at the death of the bankrupt, will be under quite different circumstances.” The claim of the assignees to the principal was given up at the hearing; but the life-interest of the bankrupt was held to pass under the commission. *Brandon v. Robinson*, 18 Ves. 429.

A testator gave an annuity to his wife, and annuities to his daughters, and the remaining rents and profits of his leasehold premises to his son, John Henry Wilkinson, and a provision to his other son, William Wilkinson; and then followed this clause: “ Provided always, and I do hereby declare, that the annuity to my wife, and the provision for my daughters, and the estates given to my said sons for their lives, is and are, upon this express condition, that, in case they, my said wife, sons, and daughters, shall respectively assign or dispose of, or otherwise charge or incumber the life-estates, the annuities and provisions so made to and for them, during their respective lives as aforesaid, so as not to be entitled to the personal receipt, use, and enjoyment thereof, then, and from thenceforth, the annuity or life estate, or interest of his, her, or their heirs respectively, so doing, or attempting so to do, shall from thenceforth cease, determine, and be void, to all intents and purposes whatsoever, and shall immediately thereupon descend to and devolve upon the person or persons who shall be next entitled thereto, by virtue of the limitation aforesaid, in such manner as the same would have done in case he, she, or they was or were then respectively actually dead, any thing herein contained to the contrary notwithstanding.”

Sir W. Grant said—“ The question in this case is, whether

For the sc- after my decease. And I direct the annuities  
 parate use of  
 married wo- bequeathed to the said Mary and Sarah J. to  
 men. be paid to them for their separate use and

the testator has expressed an intention of taking away the life-estate which he had given to his son upon the bankruptcy of that son. Now, courts of law have held that an assignment by operation of law, which bankruptcy is, is not an alienation within the meaning of a restraint against alienation. If so, the testator's son in this case has not alienated so as to forfeit his estate under the will. As to the testator having intended a personal enjoyment by his son only of this property, he probably did so; but he has not expressed himself in such a manner upon that subject, as that I am prepared to say his interest ceased by what has taken place: I shall think a little of it; and, if I change my opinion, shall intimate so." *Wilkinson v. Wilkinson*, Cooper, 259.

A testator gave an annuity to his niece, "under this strict direction, that the annuity shall not be subject to the debts or control of her present or any future husband; and the same, from time to time, shall be paid to herself only; and a receipt under her own hand, and no other, shall be a sufficient discharge for the payment thereof; his intent being, that the said annuity, or any part thereof, shall not, on any account, be alienated, for the whole term of her life, or for any part of the said term; and, if the same shall be so alienated, the said annuity shall immediately thenceforth cease and determine. He gave to his nephew (Bedford Woodham) an annuity during his life, payable," in the like manner as the above annuity, with the same direction of being paid into his own hands only, and on his own receipt, and under the same restriction, against alienating the same, or any part thereof.

This was a case sent from the Court of Chancery. (3 Ves. jun. 149, *supra*). The judges of the Court of King's Bench (Lord Kenyon, C. J.) certified, that, by the bankruptcy of Bedford Woodham, and the bargain and sale, the annuity ceased and determined. *Dommett v. Bedford*, 6 T. R. 684.

benefit, independently and exclusively of any husband or husbands to whom they may be married, and without being in anywise subject to their debts, claims, or demands; and that the receipts of the said annuitants, notwithstanding their respective covertures, shall be good and effectual releases and discharges for the same. And I expressly declare my will to be, that any sale, mortgage, or charge, or any other disposition in the way of anticipation, which any of the said annuitants shall make, or attempt, or agree to make of their said annuities, shall be absolutely void. But I hereby declare my will to be, that if my said son, or any other person for the time being, entitled to the said manors and other hereditaments charged with the said annuities, shall at any time purchase, in the names or name of the trustees or trustee for the time being of this my will, such a sum of Long Annuities as shall be sufficient to answer one or more of the annuities herein-before bequeathed by me, and declare the trusts thereof accordingly, then and in that case the annuity or annuities, for which the same respectively shall be expressed to be in satisfaction, shall no longer be a charge upon my said real estates.

XL. I give and devise to A. B. of &c., and Bequest of his assigns, during his life, the annual sum or <sup>annuity.</sup>

yearly rent charge of £ , without any deduction for any present or future taxes whatsoever, and to be paid to the said A. B. by four equal quarterly payments; and the first quarterly payment of the said annual sum or yearly rent charge of £ to be made on such of the same days as shall first happen after my decease, and to be in addition to the annuity which I have heretofore paid to him; and I charge the same on the real estates hereinafter directed by me to be limited to the use of C. D.

Power of distress in case of non-payment.

and his assigns for his life. And my will is, that in case the same annual sum or yearly rent charge, or any part thereof, shall be behind and unpaid for the space of fifteen days next over or after any of the aforesaid days of payment, then and so often it shall and may be lawful to and for the said A. B. and his assigns to enter upon all and every, or any part of the said hereditaments charged with the said annual sum or yearly rent charge as aforesaid, and to distrain for the same, or for so much thereof as shall be so in arrear, and all costs and charges occasioned by the non-payment thereof; and such distresses to sell, in like manner as for rent reserved by lease, or common demise.

Bequest of annuities.

**XLI.** I give and bequeath an annuity, or yearly sum of £ , clear of all deductions, to Mary, the widow of my old tenant, James

Young, of, &c. for her life; also an annuity of £ , to Jane , for her life; also an annuity of £ , to , for his life: and I direct the same respectively to be paid half-yearly, on the day of , and the day of in every year; and the first payment thereof respectively to commence on such of those days as shall next happen after my decease. And my will and desire is, that the widow Jones may inhabit the cottage in now in her occupation, for her life, rent free. And I charge my estate at with the said several annuities, and with the repairs of the said cottage during the life of the said widow Jones; and after her decease my will is, that the said cottage shall pass with my other estate at . And I devise the same accordingly. And I give power to the said annuitants respectively to recover the said annuities when in arrear, and all costs and charges of such recovery, by distress and sale, in like manner as rack rents are recoverable by law.

**XLII.** I give and bequeath an annuity or yearly sum of £ , clear of all deductions, unto A. B., of, &c. and C. D., of, &c. And I direct the same to be paid half-yearly, on the day of and the day of in every year; and the first

With the benefit of a term of years for securing the same. payment to commence on such of those days as shall first happen after my decease. And I direct that the said [annuitants] shall have such and the same benefit of the term of two hundred years hereinafter created, for securing their annuities, as are hereinafter given by me to , in respect of his annuity; and that the estates in , respectively charged with the same, shall contribute in equal proportions to the payment thereof respectively.

[See Index "Terms of years."]

*Proviso in case of bankruptcy of an annuitant.*

XLIII. Provided also, and I declare my will to be, that in case the said A. B. shall at any time or times become bankrupt, or take the benefit of any act of parliament for the relief or discharge of insolvent debtors, then and in either of the said cases the said annuity shall cease and be at an end; it being my intention that the said annuity shall be for the private use and benefit of the said A. B., and not be in any manner transferable to or for the use of any other person or persons. [See note "Annuities," (4).]

*Debt owing to testator not to be set off.*

And it is my will that the said annuity shall be paid to the said A. B., notwithstanding he may be indebted to me or to my estate in any manner at the time of my decease, and that such debt shall not be set against or deducted from the said annuity.

[See note "Legacies," (5) (7).]

XLIV. Provided also, and I do hereby expressly declare and direct, that, in case the said C. D. shall alien, sell, assign, incumber, or transfer, or in any manner dispose of or anticipate the said annuity or yearly sum of £ , or any part thereof, then and in such case, and from and immediately after such alienation, sale, assignment, or transfer, the same annuity or yearly sum shall cease, determine, and be void, and shall sink into and become part of the residue of my personal estate and effects. [See note " *Trusts for feme covert.*" ]

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#### PROVISION FOR WIFE OF TESTATOR.

XLV. I give and bequeath all my household goods, furniture\*, plate, china, wines, goods, &c. and liquors, unto my wife, absolutely. I give to wife.

\* The term " goods," includes all chattels, as well real as personal. Personal, because they belong to the person, or may be recovered by personal actions. Real, because they concern the realty, as terms for years of lands or tenements, wardships, the interest of tenant by statute staple, &c. ; all which interests, issuing out of, or annexed to real estates, want a sufficient legal duration, and are therefore chattels. Co. Litt. " goods;" 118 b. Property in chattels personal, may be either in possession, where the man has the actual enjoyment of the thing, or else in action, where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law, from

And of cer- and bequeath all and every the sums and sum  
tain monies. of money which may become payable to my

whence the thing so recoverable is called a chose en action. 2 Black. Com. 396. Choses en action have no locality, and bonds have no more locality than other choses en action, otherwise than by drawing the jurisdiction of the Ecclesiastical court; therefore, a bequest of *goods and chattels in a particular place*, will not pass bonds which may happen to be in such place at the death of the testator. But in a general bequest of all the testator's goods, if there is nothing in the will to restrain the construction, choses en action, as well as all other personal property, will be included: *Anon.* 1 P. Wms. 267. *Moore v. Moore*, 1 Bro. Ch. Ca. 127. *Chapman v. Hart*, 1 Ves. 273.

and "furniture," &c. The cases have gone a great length in cutting down general words, according to the limited sense of preceding words. The term, goods and chattels, will pass all the personal estate, but if those words come after "furniture," &c. they are restrained to articles *eiusdem generis*; as in the case of a silversmith, by whose bequest of all his "furniture, books, goods, and chattels," his stock in trade will not pass, though the plate in his house as household furniture would. *Smart v. Marquis of Bute*, 11 Ves. 657. *Rawlings v. Jennings*, 13 Ves. 39. *Hotham v. Salton*, 15 Ves. 319. Under the terms, "household furniture and other household effects," all property in the house, and on the premises, intended for use or consumption therein, or for the ornament thereof, will pass; but horses or cows will not, nor will hay, if for sale. *Cole v. Fitzgerald*, 1 Sim. & Stu. 189. Plate (except in the case of a tradesman's stock), is considered as included in a bequest of all the testator's household goods. Evidence of an intention or declaration of the testator to the contrary is inadmissible, as parol proof will not be allowed to alter or influence a complete and plain will in writing. *Nicholls v. Osborn*, 2 P. Wms. 418. *Snelson v. Corbet*, 3 Atk. 370. *Kelly v. Powlet*, Ambl. 605. *Porter v. Tournay*, 3 Ves. 311. In the latter case, the Master of the Rolls said, he was relieved from all difficulty in deciding what "furniture" embraces, by the determination in

executors after my decease, in respect of any insurance or insurances, either already or to be

*Kelly v. Powlet*, where Sir Thomas Clarke takes great pains to decide what should pass under that term. The word furniture will not include either books or wine.

In wills, limitations of personal goods and chattels in re-<sup>(3).</sup> Limitation remainder after a bequest for life, were long ago permitted; though, of personal originally, that indulgence was only shewn, when merely the chattels.

use of the goods, and not the goods themselves was given to the first legatee, the property being supposed to continue all the time in the executor of the devisor; but, it is now settled, that personal chattels may, by way of executory devise be so limited, as to answer the purposes of an entail, and be rendered unalienable within the duration of lives in being and twenty-one years after, and perhaps, in the case of a posthumous child, a few months more; but if the limitations are on contingencies too remote, the whole property is in the first taker. *Bodens v. Lord*

<sup>(4.)</sup> *Galway*, 2 Eden, 297. Whatever number of limitations there may be after the first executory devise of the whole interest, any vesting of one of them, which is so limited, that it must take effect (if at all) therein. within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested. Fearn. Cont. Rem. 517.

<sup>(5).</sup> It is moreover a general rule, that whenever the words of a A quasi es- will used in a bequest of personal property, would, if applied to tate tail in real property, give an estate tail, they pass an absolute interest personality in personality, unless the testator shows a clear intention, that they vests the interest absolu- shall not be so construed. Fearn. Cont. Rem. 463. In the great likely; case of *Dow v. Pitt*, or rather *Tothill v. Pitt*, a report of which, before the Master of the Rolls, is given in the first volume of Madd. Rep. 488, dividends were given to the daughter during her life; and, after her decease, the testator gave "all the afore-

hereafter effected by me on my own life, in the office of the Norwich Union Life Assurance

said lands, houses, Bank Stock and Exchequer Annuities, to the heirs male of her body, and for want of such issue, to William Daw, during his life, on condition to take and use the name of Tothill, and to his heirs male for ever." Sir Thomas Sewell was of opinion, that the Bank Stock and Exchequer Annuities and personal estate, vested absolutely in the daughter. This decree was reversed by the Lords Commissioners of the Great Seal, but, upon an appeal to the House of Lords, the decree of the Master of the Rolls was established.

The distinction taken by Lord Talbot in *Atkinson v. Hutchinson*, 3 P. Wms. 258, that where the words would give an express estate tail, the construction of law must obtain; but where only an implied estate tail, it should not, was very much laboured in *Daw v. Pitt*; for in that case, there was manifestly an express estate for life, and there were circumstances to show how anxiously the testator endeavoured to restrain it to an interest for life, but the distinction was exploded; and it is therefore to be taken as a general rule, that where the words would raise an estate tail in real estate, they will give the absolute property in personality; and if there is no distinct expression to restrain it to the time the law allows, the consequences must prevail, whatever is the intention—*per* Lord Rosslyn. *Chandless v. Price*, 3 Ves. 99, & 13 Ves. 479, n. See also *Lyon v. Mitchell*, 1 Madd. 467; in which case, all the authorities are concisely and ably reviewed by the late Vice-Chancellor, Sir Thomas Plumer. It may be added, that the vesting of such an interest in goods and chattels, as would, in the case of real property, be an estate tail, bars the issue and all the subsequent limitations as effectually, as a fine or recovery would in the case of estates intailable. Co. Lit. 20 a. n. 5.

(6).  
and bars  
the issue.

(7).  
Limitations  
of chattels  
real.

In the case of *Beauleirk v. Dormer*, 2 Atk. 307, Lord Hardwicke observed, that it would be of very mischievous consequence, and introduce great confusion, if the Court should admit of a distinction between chattels personal, and chattels real. Courts of equity do therefore admit of the like limitations in per-

Company, or in any other assurance office, unto the said [trustees], their executors, administrators. To trustees.

sonalty as in chattels real, but they will carry the limitation of a personal chattel or trust of it no farther than in the case of legal limitations of terms for years. With respect to the question whether a limitation over of personal estate, after the death of the first taker without issue, generally, is a good limitation? (8). his lordship said, that such limitation was void; but in a will, Chattels the words would not receive such a construction, as to a man cannot be limited dying without issue at the death of the party, unless there were after a dying words in the will indicating such to be the testator's intention, without Personal property may therefore be devised in strict settlement issue. to one for life, remainder to sons and daughters in tail, so as to be transmissible like heir looms. But as the goods will in such case be the absolute property of the first tenant in tail, it is necessary to insert the proviso and declaration in the precedent; namely, (9). that "the leasehold or personal estate shall not vest absolutely in any child or children of any tenant for life, unless and until he, she, or they shall attain the age of twenty-one years, pro- vided that such child or children, for the time being, may during his or her minority, be entitled to the rents and interest." To tail. conclude this point.—The absolute interest in plate, books, and household furniture left "to be enjoyed as heir looms, and to go in succession, as far as by the rules of law and equity they may," will vest in that person who is the first tenant in tail or in fee in the real property, and, upon his death, that interest will pass to his personal representatives. *Foley v. Burnell*, 1 Bro. Ch. Ca. 274.

Things personal may belong to their owners, not only in How per- severalty, but also in joint tenancy and in common, and if a sonalty may personal chattel be given to two or more, absolutely, they are be held. joint tenants thereof; and unless the joint tenancy be severed, the same doctrine of survivorship shall take place as in real estate. So if money be given by will to two or more equally to be divided between them, this makes them tenants in common, 2 Bl. Com. 398. And if the will direct, that on the death of

trators, and assigns. Upon trust, that they the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, as soon as conveniently may be after my decease, lay out and invest such sums or sum of money, in their or his names or name, in the parliamentary stocks, or public funds, of Great Britain, or at interest upon government or real securities, in England or Wales. And do and shall from time to time, during the life of my said wife, with her consent in writing, and, after her decease, at their or his discretion, alter, vary, and transpose the said sums or sum of money, so to be laid out and invested for or into other stocks, funds, and securities of a like nature. And I do hereby declare that the said [*trustees*], their

(11).  
As to sur-  
viving and  
accruing  
shares.

one of the legatees, his share shall go to the survivor, it will so survive. But, as it is a general rule, that new survivorship shall not take place, it is necessary that a clause should be specially introduced, for the purpose of carrying any surviving or accruing share to the survivors. [See clause of *Accruer*]. This point was the subject of the decision in *Pain v. Benson*, 3 Atk. 78, and the following case was proposed by Lord Hardwicke : " If a man give a sum to be divided amongst four persons as tenants in common, and he directs, that if one of them die before twenty-one or marriage, the money shall survive to the others. Suppose one should die, and three are living, the share of that one so dying will survive to the other three ; but if a second die nothing will survive to the remainder, except the second's original share, for the accruing share is as a new legacy, and there is no further survivorship."

executors, administrators, and assigns shall stand and be possessed of and interested in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, Upon trust that they the said [*trustees*], and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall pay the said interest, dividends and annual produce unto, or permit the same to be received and taken by my said wife or her assigns, during her life, for her and their own absolute use and benefit. And from and immediately after the decease of my said wife, I declare that the said trustees or trustee for the time being, shall stand and be possessed of and interested in the said trust monies, stocks, funds and securities, and the interest, dividends, and annual produce thereof; upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoess, and declarations hereinafter expressed and declared of and concerning the same, &c.

To pay the  
interest  
thereof to  
wife for her  
life.

**XLVI.** I give and bequeath to my wife, Bequest of all my china, household goods (ex-  
cept plate), furniture, wines, and liquors. And And the use I also give to my said wife the use of all my plate for plate during her life. And from and immedia- mainder to sons equal-ately after her decease, I give and bequeath ly, &c. the same plate unto my two sons, John and

Samuel, to be divided equally between them; but if one only of my said sons shall be then living, I give and bequeath the whole thereof unto such only son. And if neither of my said sons be then living, I direct that the same plate shall be considered as part of the residue of my personal estate. And I request that an inventory shall be made of such plate immediately after my decease, and that my said wife shall sign such inventory, accompanied with an undertaking for the delivery thereof by her representatives, upon or immediately after her decease, to the persons or person who shall be entitled to the same under this my will\*.

In case of  
decease of  
both sons,  
the same to  
augment the  
personal es-  
tate.  
Directions  
as to an in-  
ventory.

As to an in-  
ventory of  
goods.

\* A tenant for life of goods cannot be compelled to give security for the goods; but the court will direct a schedule or inventory to be made and signed by him, to be delivered to the person next in succession, or to be deposited with the master for the benefit of all parties. *Leeke v. Bennett*, 1 Atk. 470. *Bill v. Kin-  
aston*, 2 Atk. 81. It is expressly laid down in *Slanning v. Style*, 3 P. Wms. 335, that, as to those things, the use whereof are given to a person for life, he must sign an inventory, expressing that those things are in his custody as given to him for life only, and that afterwards they are to be delivered, and remain for the use and benefit of the person in remainder. But although it appears that a direction need not, of necessity, be inserted in the will, requiring the devisee for life to sign an inventory, as the court of Chancery will compel him to do so; yet it is nevertheless desirable, that the will should expressly require it.

If the will directs that an inventory shall be taken of certain goods, that direction alone will be sufficient to limit the use only of the goods to the legatee during his life, and to indicate the intention of the testator, that the absolute property in them should

XLVII. I give and bequeath to my wife Bequest of furniture, &c. to wife.  
 all the furniture, linen, wines, liquors,  
 and provisions, which shall be in or about my  
 house at , aforesaid, at the time of my  
 decease, and her own wearing apparel, watches,  
 lace, and trinkets, and other personal ornaments ; and I give her the landau or coach  
 which I shall have at the time of my decease.  
 I also give and bequeath to my said wife, the And of an  
 annual sum of £ to be paid to her by annual sum,  
 even and equal quarterly payments, on the four  
 most usual feasts or days of payment in every  
 year, without any deduction or abatement  
 whatsoever ; and the first quarterly payment  
 of the same I direct to be made at the expira-  
 tion of three calendar months next after my  
 decease. And I charge the same on my es- charged on  
 tates at hereinafter devised. And I certain  
 give her the sum of £ , to be paid in the  
 shares, and at the time hereinafter mentioned ; Bequest of a  
 that is to say, the sum of £ , part thereof to sum of mo-  
 ney to be  
 be paid within one calendar month after my paid at dif-  
 decease ; and the sum of £ , the re- ferent pe-  
 riods.

not be given; as where a testator desired, that an inventory of his "household goods and plate, should be taken and kept, " with his title deeds of his estate, for the advantage of that person who should enjoy the same, as before directed." It was held, that the articles having been sold, the money produced by the sale should be laid out, and the legatee have the interest for his life only. *Southey v. Lord Somerville*, 13 Ves. 486.

maining part thereof, to be paid to her within six calendar months after my decease. And I also give and bequeath all the jewels and pearls I may be possessed of at the time of my decease, to my said wife, during her life; and from and after her decease, to my daughter

to wife for life. After her decease, to married daughter for her sole use.

Mary, now the wife of A. B. for her sole, separate, and peculiar use, in case she survives her mother; and in case she shall depart this

life in the lifetime of her said mother, then to But in case of her death to second daughter. my daughter Jane, for her sole, separate, and peculiar use; and if both of them, my said daughters, Mary and Jane, shall depart this in case of death of both, to eldest son. my eldest son John absolutely. (*See note, est son.*

*"Personality, (3)." I give and bequeath all my plate to my wife, during her natural life. And for life. from and after her decease, to my said eldest son John absolutely.*

Direction to trustees to invest money in the funds, &c. **XLVIII.** And I direct that the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, shall with all convenient speed after my decease, invest the sum of £ in the purchase of a competent share of the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England, in their or his names or name, and pay the interest, di-

vidends, and annual produce of the same, To pay interest there-  
 to my said wife. And after the decease of my of to wife;  
 said wife, or in her life-time, if she shall con- and after  
 sent to it by writing under her hand, do her decease,  
 and shall call in and convert the said sum of or in her  
 £ , and the stocks, funds, and securities life-time,  
 in which the same shall be laid out or invested,  
 into money, and lay out and invest the money therewith to arising thereby in the purchase of manors, <sup>purchase</sup> real estate,  
 messuages, lands, tenements, and heredita-  
 ments, in England or Wales; and settle and <sup>to be settled</sup>  
 assure the lands so to be purchased, to the uses, <sup>upon cer-</sup>  
 upon and for the trusts, intents, and purposes, <sup>tain trusts.</sup>  
 and with, under, and subject to the powers,  
 provisoies, and declarations, hereinafter ex-  
 pressed and contained, of and concerning my  
 unsettled estates in , or such of them  
 as shall be then subsisting, and undetermined,  
 or capable of taking effect. And I also de- Direction  
 clare, that it shall be lawful for my said wife, <sup>that wife</sup>  
 if she shall think fit, to reside in my mansion <sup>in the man-</sup>  
 house at aforesaid, for the space of <sup>house</sup> for months,  
 calendar months next after my decease.

And that she shall, during that time, have the and have  
 free and full use of all articles of furniture and <sup>the use of</sup>  
 provisions, which shall be in my said house at <sup>furniture for</sup>  
 the time of my decease. And that she shall <sup>that time,</sup>  
 pay no rent or other consideration for the same. <sup>without</sup>  
 And that my said estates at shall during <sup>paying any</sup>  
 that time pay all the taxes, and the wages of the <sup>rent.</sup>  
 &c. shall be chargeable

upon other property. gardener, and other labourers, that shall or may become due or owing during that time, for or in respect of the said mansion house and premises.

**XLIX.** I give and devise my mansion house at , in the county of , and the coach-houses, stables, out-buildings, offices, and the garden thereunto belonging, unto and to the use of the said [trustees], their heirs and assigns, during the life of my wife , in trust, to pay the rents, issues and profits of the same unto, or permit the same to be received, used, held, and occupied by my said wife, during her life, for her sole, separate, and peculiar use and benefit, independently and exclusively of any husband with whom she may happen to intermarry, without being in any wise subject or liable to his control, debts, interference, or engagements; and her receipts for the said rents and profits shall be good and effectual releases and discharges for the same, notwithstanding her coverture; and I direct that the said [trustees], and the survivor of them, and the heirs and assigns of such survivor, shall cause the said mansion house and other buildings to be put into complete repair, and painted, and preserve the same in complete repair and fresh painted during the life of my said wife, and pay the expenses of all such

**Wife to receive rents of, or to occupy certain property,**

**independently of any future husband.**

**Directions as to repairs, &c.**

repairs and painting out of my personal estate: and also that, during the life of my said wife, my said trustees or trustee for the time being, shall, out of my said personal estate, pay all parliamentary and parochial taxes, and pay-  
 and all out-goings whatsoever; and after the decease of my said wife, I give my said mansion house, buildings, garden ground, and other hereditaments whatsoever, at the aforesaid, same pro-  
 to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to uses.  
 the powers, provisoies, and declarations herein-  
 after expressed, of and concerning the said es-  
 tates at , hereinafter by me devised to my son James, for his life, with such remainders over, of, and in the same, as are hereinbefore expressed and contained. But my will is, that during the life of my said wife, the said [trustees], and the survivor of them, and the execu-  
 tors or administrators of such survivor, shall be at liberty, with the approbation of my said wife, to demise or lease the said mansion house, buildings, and other hereditaments at , for any term or number of years, not exceeding (seven) years, at such rent, and upon such terms as they or he shall think reasonable, but without taking any fine or foregilt for the same: and my will is also, that during the life of my said wife, the said [trustees], and the survivor of them, and the executors or administra- With con- sent of wife, trustees may sell,]

tors of such survivor, shall be at liberty, with the approbation, in writing, of my said wife, to sell the same mansion house and estate in the lifetime of my said wife; and if such sale shall be made, they, the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, shall have the powers, rights, and privileges for effecting the same,

and apply money as directed in a subsequent power of sale.

Wife to receive rents of purchased premises for her life, and interest of securities.

and to the interest, dividends, and annual produce of the stocks, funds, and securities, in which the same shall be invested.

Devise of certain hereditaments,

subject to mortgages; and also of all other hereditaments,

L. I give and devise all the messuages, lands, and other hereditaments comprised in, and assured by the hereinbefore recited indentures of lease and release and settlement, with their rights, members, and appurtenances (subject to the mortgages affecting the same), and also all other the manors, capital, and other messuages, lands, tenements, and hereditaments, wheresoever situate, of or to which I, or any person or persons in trust for me, now is or are

seised or entitled, for an estate of freehold and inheritance, or of freehold in possession, reversion, remainder, or expectancy, or which, by virtue of any special power, I am enabled to appoint by this my will, with their rights, members, and appurtenances (except the estates vested in me except trust in trust, or by way of mortgage, or under any lease or leases for lives), to the uses and in the manner following: that is to say, to the use and intent, that my wife she shall survive me), and her assigns, may receive during her life (and in bar of her dower) an annual sum of £ , of lawful money of Great Britain, clear of all deductions and abatements whatsoever, to be issuing out of the said manors, messuages, hereditaments, and premises hereinbefore devised, and to be paid payable by four equal quarterly payments—on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in every year, the first quarterly payment thereof to be made on such of the said days as shall first happen after my decease: and I hereby give to my said wife, and her assigns, such powers of entry, and distress and sale, upon the manors, messuages, hereditaments, and premises, for recovering the said annual sum of £ , if the same, or any part thereof, shall be in arrear for the space of twenty-one days, as are given to landlords for

recovering rents reserved on common demise ; subject thereto, to the use of [trustees], their executors, administrators, and assigns, for the term of six hundred years, to be computed from the day of my decease, and thenceforth next ensuing, and fully to be complete and ended, without impeachment of waste, upon

upon trusts after mentioned.

Subject thereto, to various uses in favour of children, &c.

Declaration as to trusts of term of years :

as to part of hereditaments,

the said manors, messuages, hereditaments, and premises, as are comprised in, and assured and limited by, the hereinbefore recited indentures of lease and release and settlement, with their rights, members, and appurtenances, upon trust, that the said [trustees], and the survivor of them, and the executors, administrators,

and assigns of such survivor, do and shall in the first place, by sale or mortgage of the same manors, messuages, hereditaments, and premises, or any of them, or any part thereof, for the whole or any part of the said term of six hundred years, or by such other ways and means as the said [*trustees*], or the survivor of them, or the executors, administrators, or assigns of such survivor shall think proper [levy to raise money for certain purposes; and raise money sufficient for the payment and satisfaction of so much and such part of my just debts, &c. as the personal estate should be insufficient to pay. *See Index, "Debts."*] And as to all the said manors, messuages, hereditaments, and premises, comprised in the said term of six hundred years (but subject to the trusts hereinbefore declared, in regard to such of them as are comprised in, and assured and limited by, the said indentures of lease and release and settlement), upon trust, that if the said annual sum of £ , hereinbefore limited to the use of my said wife, and her assigns, during her life, or any part thereof, shall be in arrear for the space of sixty days next after any of the days hereinbefore appointed for the payment thereof, then and so often as the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, do and shall, with and out of the rents and profits of the said manors, messuages, hereditaments, and premises, or by sale

as to all the  
heredita-  
ments;  
the before-  
mentioned  
trusts  
for further  
securing the  
annual sum  
to wife:

or mortgage of the same manors, messuages, hereditaments, and premises, or any of them, or any part thereof, for the whole or any part of the said term of six hundred years, or by such other ways or means as they or he shall think proper, levy and raise the said annual sum of £ , or so much thereof as shall be so in arrear, and all expenses which my said wife, her executors, administrators, or assigns, or the said [*trustees*], or the survivor of them, or the executors, administrators, or assigns of such survivor, shall sustain or be put unto, by reason of the non-payment thereof, or of any part thereof, or otherwise, in the execution of the said trusts. And as to all the said manors, messuages, hereditaments, and premises, comprised in the said term of six hundred years (subject to the trusts aforesaid), upon this further trust, that the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall [*raise portions for children. See Index "Portions," and see "Terms for Years."*]

.and subject  
as aforesaid,  
upon cer-  
tain fur-  
ther  
trusts.

[*For the devise of real estate, and of leasehold estate, and chattel interests, to trustees for sale, see Index, "Devise."*]

Trustees to  
stand pos-  
sessed of

**Ll.** And I do hereby declare my will and mind to be, that the said [*trustees*], and the

survivors and survivor of them, and the execu- the money  
 tors, administrators, and assigns of such sur- arising from  
 survivor, do and shall stand and be possessed of,  
 sales, &c.  
 and interested in, all the money to arise from  
 the sale or sales hereinbefore by me directed  
 to be made of my real and leasehold estates,  
 or to arise or be produced from that part of  
 my personal estate which I have directed to  
 be converted into money; and of and in the  
 monies, government securities, stocks, or funds,  
 and mortgages on real estate of or to which I  
 shall be possessed or entitled at the time of my  
 decease, and of and in the rents, issues, profits,  
 interest, dividends, and annual produce there-  
 of, until the same shall be respectively disposed  
 of and converted into money, or otherwise  
 howsoever, upon trust that they the said [*trust-  
 ees*], and the survivors and survivor of them,  
 and the executors, administrators, or assigns of  
 such survivor, do and shall, by, with, and out  
 of the same, in the first place, pay, satisfy, and First to pay  
 discharge all my just debts and funeral and debts, &c.  
 testamentary expenses. And do and shall, with  
 all convenient speed after my decease, with and  
 out of the said sum and sums of money, levy  
 and raise a sum of money, the yearly dividends, To raise mo-  
 interest, and produce of which, when converted ney to pro-  
 duce a cer-  
 as hereinafter is mentioned, will amount to or tain annual  
 produce the clear yearly sum of £ <sup>sum.</sup>, of  
 lawful money of Great Britain, clear of all de-

Direction as ductions and abatements whatsoever; and do to the investment of such money,

and shall lay out and invest the said sum of money so to be levied or raised as last aforesaid, in their or his names or name, in the purchase of a competent share or competent shares of the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England: and do and shall, from time to time, with the consent of my wife

and change of securities:

, as long as she shall continue my widow and unmarried, testified by some writing signed by her, with her name in her own hand-writing, and after her decease, or in case she shall marry again after my decease, then from and after her said marriage, at the discretion of my said trustees or trustee for the time being, alter and vary the said stocks, funds, and securities, as to them or him shall seem reasonable; and do and shall pay the dividends, interest, and annual produce of the said last-mentioned trust monies, and the stocks, funds, or securities in or upon which the same shall and may, from time to time, be laid out and invested, to, or permit the same to be received by my said wife and her assigns, for her and their own proper use and benefit during such time, and so long as she shall continue my widow and unmarried.

to pay the dividends,  
&c. to wife  
during wi-  
dowhood.

Deficiency  
(if any)  
how to be  
supplied.

And my will is, and I do hereby direct, that if at any time the dividends, interest, and annual produce of the said last-mentioned

trust monies, and the stocks, funds, and securities, in or upon which the same shall be laid out and invested, shall, from any cause or circumstance whatsoever, prove insufficient to answer and satisfy the purposes aforesaid, my said trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, by and out of the interest, dividends, and annual produce of the residue of the money which shall come to their or his hands by the ways and means hereinbefore mentioned, raise such further sum or sums of money as shall be sufficient to make good such deficiency, and pay and apply the same accordingly: and in case my said wife shall happen to marry after my decease, In case wife  
should marry again, do and shall, after she shall so marry, by and out of the dividends, interest, and annual produce of the said trust monies, stocks, funds, and securities, so to be appropriated as aforesaid, pay the clear yearly sum of £ , to pay a  
of like lawful money, without any deduction or  
abatement whatsoever. And as to the residue her. Direction as  
or surplus of the money which shall come to  
the hands of my said trustees, or the survivors  
or survivor of them, or the executors, adminis-  
trators, or assigns of such survivor, by sale of  
my said freehold, leasehold, and real estates,  
and by collecting, getting in, and receiving my  
said personal estate, in manner hereinbefore

directed, and which shall remain after answering and satisfying the trusts and purposes hereinbefore declared, of and concerning the same; I do hereby declare my will and mind to be, that the said [*trustees*], and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, &c.

*Direction  
that trustees  
shall stand  
possessed of  
certain monies,*

LII. And I do hereby declare, that the said trustees or trustee for the time being shall stand and be possessed of, and interested in the said trust monies, and the stocks, funds, and securities on which the same shall be invested; and the interest, dividends, and annual produce thereof, upon and for the trusts, intents, and purposes hereinafter expressed of and concerning the same; that is to say; Upon trust, that they the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, during such time as my said wife shall continue my widow and unmarried, with and out of the said trust monies, stocks, funds, and securities, till wife's second marriage, levy and raise the annual sum of £ , and to raise an annual sum, and pay same to wife by certain portions. pay the same to my said wife, or her assigns, by equal payments in every year, the first payment thereof to commence and be made at the expiration of calendar months after my decease. And if my said wife shall happen to marry after my de-

cease, then do and shall, after such marriage, After second marriage,  
 and during the remainder of her life, with and  
 out of the said interest, dividends, and annual  
 produce of the said trust monies, stocks, funds,  
 and securities, levy and raise the sum of £  
 and pay the same to my said wife, or smaller  
 her assigns, by payments in every year,  
 the first payment thereof to commence  
 and be made at the expiration of three calen-  
 dar months after my decease. And I do here- Each of the  
 by declare, that each of the said annual sums annual sums  
 of £ and £ shall be paid without deduction.  
 any deduction or abatement whatsoever out of  
 the same, for any present or future taxes,  
 charges, or impositions, and shall be accepted  
 and taken by my said wife in lieu and satisfac-  
 tion of all dower and free bench to which she  
 may be entitled upon my decease. And I fur- Subject to  
 ther declare, that subject and without preju- the payment  
 dice to the payment of the said annual sums of sums,  
 £ and £, the said trustees or Trustees to  
 trustee for the time being shall stand and be stand poss-  
 possessed of and interested in the said trust trust mon-  
 monies, stocks, funds, and securities, and the Upon cer-  
 interest, dividends, and annual produce there- tain further  
 of, in trust, &c.

LIII. I give and bequeath unto the said Bequest of  
 [trustees] the sum of £ of lawful money to  
 money of Great Britain, upon trust, that they the trustees.

said [*trustees*], or the survivor of them, or the Declaration executors or administrators of such survivor, as to invest- do and shall, as soon as conveniently may be ment there- after my decease, lay out and invest the said of.

sum of £                in their or his names or name, in the purchase of some or one of the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England. And do and shall from time to time, alter, vary, and transpose the said trust monies, stocks, funds, and securities, into or for other stocks, funds, or securities of the like nature, at their or his discretion. And do and shall stand and be possessed of, and interested in, the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, Upon and for the trusts, intents, and purposes hereinafter expressed and contained of and concerning the same; that is to say; Upon trust, that they the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, during such time as my said wife shall

Upon trust to pay an annual sum to wife dur- ing widow- hood. £                , and pay the same to my said wife, or her assigns, by                equal                pay- ments in every year, the first                payment

thereof to commence and be made at the expiration of calendar months after my decease. And if my said wife shall happen to marry after my decease, then do and shall, <sup>And in case of second marriage, a</sup> after such marriage, and during the remainder <sup>smaller sum,</sup> of her life, with and out of the said interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities, levy and raise the sum of £ , and pay the same to my said wife, or her assigns, by payments in every year, the first payment thereof to commence and be made at the expiration of calendar months next after such marriage. And I do hereby declare, that each of the said annual sums of £ and £ shall be paid without any deduction or abatement whatsoever out of the same, for any present or future taxes, charges, or impositions, and shall be accepted and taken by my said wife in lieu and satisfaction of all dower and free bench to which she may be entitled upon my decease. And I further declare, that subject and without prejudice to the payment of the said annual sums of £ and £ the said trustees or trustee for the time being shall stand and be possessed of, and interested in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof. In trust, &c.

Subject thereto, declaration of further trusts there-of.

[*For direction as to the investment of money in the funds, &c. and as to varying of securities, see Index "Securities."*]

Declaration  
that trustees  
shall stand  
possessed of  
trust monies

Upon trust  
during the  
life of wife,

out of last  
mentioned  
dividends, to  
raise such  
annual sum  
as together  
with divi-  
dends before  
settled  
should  
amount to a  
certain sum.

And during  
minorities of  
sons, &c.

LIV. I do hereby declare, that the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, shall stand and be possessed of, and interested in the same trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, Upon trust, that they the said trustees or trustee for the time being do and shall, from time to time, during the life of my wife , with and out of such last mentioned interest, dividends, and annual produce, levy and raise such an annual sum as, together with the interest, dividends, and annual produce of the stocks, monies, funds, and securities hereinbefore settled on my said wife for her life, will amount to the annual sum of £ , clear of all deductions and abatements whatsoever from the said sum of £ . And also do and shall, from time to time, during the respective minorities of my two sons, William and Thomas, so far as relates to them, and until all and every of my other present and future born children shall respectively take vested interests or a vested interest in the portions or portion for them, him, or her hereby respec-

tively provided, so far as relates to such other present and future born children, if she my said wife shall so long live, with and out of such last mentioned interest, dividends, and annual produce, levy and raise the annual sum of £                for each of them the said William and Thomas, so for the time being under the age of twenty-one years, and for each of my other present and future born children, whose said portions shall not for the time being have become vested; and do and shall during the life of my said wife pay such first mentioned annual sum so to be levied and raised; and also the said several sums of £                and £                , so for the time being levied and raised, to my said wife, or her assigns, by four equal quarterly payments every year, the first quarterly payment thereof to commence and be made at the expiration of                calendar months next after my decease. Provided always, and I do hereby direct, that my said wife shall, with and out of the said annual sum of £                , hereinbefore provided for her, and also with and out of the said sum of £                , so to be paid to her or her assigns as aforesaid, educate and maintain my said sons William and Thomas during their respective minorities, and all and every my other present and future born children and child, until such respective times to raise an annual sum for each child, and to pay all the sums to wife by quarterly payments. Direction that wife shall educate and maintain children during minorities.

gave his freehold messuages to his three children, &c. There was an express clause of entry and distress, and the annuity was charged upon other funds, not subject to dower, as well as upon the dowable estate. In *Arnold v. Kempstead*, cited *Ib.* the testator gave some leasehold estates to his wife for life, and then gave her an annuity, to be paid to her yearly during her natural life, or so long as she should continue a widow, out of the rents and profits of his freehold estates in Queen's Square. Subject thereto, the testator devised his said estates in Queen's Square to his son, with remainders over. There was no power of distress and entry, and the annuity issued only out of the estate subject to dower. The two last-mentioned cases, however, were conflicting authorities. Then followed the case of *Villareal v. Lord Galway*, Ambl. 682, more correctly stated 1 Bro. Ch. Ca. 292 (*n*), where the testator devised to his wife an annuity, or clear yearly sum of 200*l.*; and subject thereto, devised his real estate to trustees and their heirs in trust, to preserve contingent remainders; but nevertheless to permit and suffer the testator's daughter to receive and take the rents, &c. for her use, with power to lease for her life; and then after her decease, in trust for the heirs of the body of his said daughter, and in default of such issue, with remainders over. The question was, whether, if a rent charge was given to the widow, issuing out of the estate subject to dower, with power of distress, the devise should operate as a bar or satisfaction of her dower. Lord Camden was of opinion that it should, because the claim of dower, first, disappointed the will; and, secondly, was inconsistent with it. The claim of dower would put the trustees out of possession; but the annuitant could not, consistently with the will, take possession of any part, because her right of entry into the whole put her out of possession of the whole, till her right of entry accrued upon default of payment. It was therefore considered impossible, in such a case, to make the land subject to the dower, and the rent charge at the same time; because, as annuitant, the widow must be out of possession of the whole, as dowress she must be possessed of a part; and his Lordship held, that as the testator gave the estate subject to the annuity, he must be intended to give subject to the annuity only; and the residue of the rents and

profits being given to the devisee, that devise must exclude all charges, except only the annuity. It was also held, that the claim of dower was inconsistent with the will in another light, as it would diminish the annuity itself, which was contrary to the very words of the will; for if the widow entered into a third in right of her dower, she must sink so much of her annuity as would bear a proportion to her right of dower: whether the annuity clashed with the dower or the dower with the annuity, it was considered to be equally decisive, for she could not enjoy both, unless both could be reconciled to the will. Nor could the whole annuity, by an equitable marshalment, be thrown upon the two remaining thirds; because that would in terms contradict the will, which charged the whole, and gave a power of distress on the whole. By such a train of argument, Lord Camden arrived at the conclusion, that the widow was barred by necessary implication. Lord Loughborough afterwards declared, that the law was then settled, and very plain. He said, the gift of an annuity to the wife might be a bar of dower, or might not, according to the language of the will. Thus, where the value of the lands was not sufficient to satisfy an annuity to the widow, and an annuity to the testator's brother, and also the dower to the widow, it was considered as proving that the provision for the widow was intended to be in bar of dower, *Pearson v. Pearson*, 1 Bro. Ch. Ca. 292. Sir Thomas Sewell (Master of the Rolls) also said it was unnecessary that the testator should expressly declare his intention, it was sufficient if it appeared from circumstances. In that case (*Jones v. Collier*, Ambl. 730,) the testator devised to his wife his dwelling-house, with the household goods and furniture, for her life, and charged all his freehold estate with an annuity of 40*l.*, and gave a power of distress, in case of non-payment. After charging his estate with the payment of another annuity to his nephew, with the like power of distress, he gave his dwelling-house and furniture, after the death of his wife, and all his freehold estates, so chargeable as aforesaid, to trustees, until his niece should attain twenty-five years, and to his niece, on attaining that age, with remainders over. The testator ordered his executors to allow and apply, until his niece should attain twenty-five years, the surplus of the

rents and profits of his said estates, subject as aforesaid, for her maintenance and education. The court held that the testator had expressed himself with respect to the rents and profits, so as to exclude all idea of dower. He directed the application of the *surplus* rents and profits. He had also entered into a contract for sale of part of his estate, and considering himself as having power to dispose thereof, free from dower, directed his trustees to complete the contract, and convey to the purchaser. See also *Wake v. Wake*, 3 Bro. Cha. Ca. 254. S. C. 1 Ves. Jun. 335.

But, on the other hand, Lord Thurlow gave a different view of the subject in the following case. A testator gave to trustees all his real and personal estate whatsoever, upon trust, to pay his wife an annuity of 50*l.* a year during widowhood, (and in case she married again to pay to her 30*l.* only,) and to permit his wife to have the use of his mansion-house and furniture during her widowhood, and desired his trustees to improve and manage his real and personal estate, in the best manner they could, for the benefit of the child, wherewith his wife was then pregnant; and when his child should arrive at the age of twenty-five years, the testator devised and bequeathed to his child in fee, all his real and personal estates, charged and chargeable with the payment of the annuity to his wife. By a codicil the testator gave to his wife a legacy, and in case of surplus in the hands of the trustees, after payment of debts and legacies, his wife was to be entitled to one moiety. The Lord Chancellor considered that the wife had a claim upon the estate paramount to the will; she had an absolute right to the third part; it was not the testator's to deprive her of it; because (continued his Lordship) he gives all *his* property to the trustees, *am I to gather from his having given all he has, that he has given that which he had not?* So far from a declaration plain, I have nothing even to lead me to think he meant to deprive her of dower. She must, therefore, have her dower. *Foster v. Cook*, 3 Bro. Ch. Ca. 347.

In *Greatorex v. Cary*, 6 Ves. 615, the testator bequeathed to his wife 150*l. per annum*, during widowhood, which he desired his executors to pay out of the produce of his real and personal estate; which personal estate he directed to be placed out at in-

terest, to assist his real estate in the payment of the annuity. It was decreed that the widow was entitled to dower. In a subsequent case, where a testator gave to his wife and his two children all his estates whatsoever, to be equally divided amongst them, whether real or personal, the right to dower in the widow was considered a case of election; the claim of dower being directly inconsistent with the disposition of the will. The testator directing all his real and personal estate to be equally divided, &c., the same equality was intended to take place in the division of the real as of the personal estate, which could not be if the widow first took out of it her dower, and then a third of the remaining two-thirds. The doctrine propounded by Lord Thurlow, as before mentioned, was thus ingeniously surmounted. By describing his estates, said Sir William Grant, the testator excluded the ambiguity which Lord Thurlow, in *Foster v. Cooke*, imputes to the words, "my estate," as not necessarily extending to the wife's dower. Here the testator says, the property which he thus bequeaths, consists of these particulars. It is therefore the property itself, thus described, that is the subject of the devise, and not what might, in contemplation of law, be the testator's interest in that property. This is therefore a case of election; but before the widow can be compelled to elect, she is entitled to know what she has a right to claim under the will. *Chalmers v. Storil*, 2 Ves. & Bea. 222.

In *Miall v. Brain*, 4 Madd. 119, the testator devised his real and personal estate to trustees upon trust, out of the rents and profits and annual income of his real and personal estate, to pay to his wife an annuity during widowhood, and after his son attained twenty-one, as to certain part of his real estate in the parish of Portsea, in trust for such son in fee, subject, nevertheless, to the payment of the said annuity, or yearly sum, to be paid to his wife during her widowhood, which should thenceforth be charged exclusively upon the same premises; and upon trust to pay to his daughter an annuity for her life; and also to permit and suffer her to use, occupy, and enjoy certain hereditaments in the parish of Portsea for her life. The testator evidently contemplated for his daughter the personal use, occupation, and enjoyment of this house; and such personal use, occupation, and

enjoyment was inconsistent with the widow's right to dower out of that house. Such an estate or interest was given to the trustees as would enable them to secure to the daughter this occupation and enjoyment. The Vice-Chancellor therefore argued, that as this house was part of a general devise to the trustees of all the testator's real estate, and as the testator had not given this house to the trustees, free from the widow's dower, unless he had so given his whole real estate, the intention was plain, that the trustees were intended to take an interest in the house, which excluded the widow's dower, and the same intention was also necessarily applied to the whole estate, which passed by the same devise. *Butcher v. Kemp* and others, 5 Madd. 61. *Lord Dorchester v. The Earl of Effingham*, Coop. 319. *Roberts v. Smith*, 1 Sim. & Stu. 513.

It should be added, that a provision for the widow out of the personal estate of the testator will not bar her claim to dower. Thus, where a man by his will, taking no notice of his wife's right to dower, made a provision for her out of the personal estate, by way of residue. It was insisted that this was a bar of dower by implication; but Lord Hardwicke held, that by the claim of dower the wife did not break in upon the will, and the testator might intend she should have the uncertain benefit of the residue, as well as dower. *Ayres v. Willis*, 1 Ves. 230.

It must evidently appear from the circumstances of the will, that a devise or provision for the widow is intended by the testator to be in satisfaction of dower; otherwise the widow would not be put to election; but might enjoy both the dower and the provision made for her in the will. It is highly desirable in all cases that the testator should expressly declare his intention whether the provision made by the will is intended to be in satisfaction of dower.

## AS TO THE TRADE OF TESTATOR.

LVI. Whereas I have for some time past carried on the business of , at aforesaid ; and whereas I am desirous that the said business should be carried on after my decease for the benefit of my wife and children. Trade to be carried on for benefit of wife and children.

I do hereby give and bequeath my said business of , and all my interest therein, and all my stock and effects now or hereafter to be employed therein, and all monies and debts which shall belong and be due and owing to me at the time of my decease, for or on account of the said business, and also all messuages, workshops, warehouses, and hereditaments, now or hereafter to be employed in, or connected with, the carrying on of the said business, unto the said [trustees], their executors, administrators, and assigns, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoies and declarations hereinafter expressed and declared of and concerning the same; that is to say; Upon trust, that they the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall carry on, manage, and conduct the said business until my second son Thomas attains

Bequest of business, &c. to trustees;

same,

till second son attains the age of 21 years, or (in the event of my eldest son William dying in the lifetime of my

21, &c. said son Thomas) until my said son Thomas dies, which shall first happen; or (in the event

or, in case of his death till eldest son attains 21. of the death of my said son Thomas whilst my said son William shall be living, and under the age of twenty-one years,) until my said son William attains the age of twenty-one years, or

Declaration dies, which shall first happen. And I do as to trusts hereby declare, that during such time as the of the busi- ness and the profits.

said business shall be carried on by the said trustees or trustee for the time being, in pursuance of this my will, they and he shall stand and be possessed of and interested in the said business, stock, effects, monies, debts, mes- suages, workshops, warehouses, and premises, and the profits to arise from the same; Upon and for the same trusts, intents, and purposes, and with, under, and subject to the same powers, provisoies, and declarations, (including the an- nual sums hereinafter directed to be paid to my said wife), upon, for, with, under, and sub- ject to which the said trustees or trustee for the time being would, in pursuance of this my will, stand and be possessed of, and interested in the monies to arise from the sale of the said business and premises, and the stocks, funds, and securities in which the same shall be in- vested as hereinafter is mentioned, and the in- terest, dividends, and annual produc~~e~~ thereof

in case the said business and premises were sold immediately after my decease, or as near thereto as circumstances will permit. Provided Sons to be always, and I do hereby direct, that during employed in such time as the said business shall be carried on by the said trustees or trustee for the time being, in pursuance of this my will, my said sons William and Thomas, and the survivor of them, shall always be employed therein, and the said trustees or trustee for the time being shall carry on, manage, and conduct the said business with their or his advice and assistance; and after my said son William shall have attained the age of twenty-one years, and until Eldest son the said business, stock and effects, messuages, workshops, warehouses, and premises shall be allowed a sold by virtue of this my will, shall, with and out of the profits to arise from the said business, allow him the said William such an annual sum, not exceeding £ , for his trouble, as the said trustees or trustee for the time being may think proper. And I direct, that when and so soon as my said son Thomas shall attain the age of twenty-one years, or shall die under that age, (which shall first happen), or in When busi- the event of the death of my said son Thomas ness to be sold. whilst my said son William shall be living and under the age of twenty-one years, then, when and so soon as my said son William shall attain

and directions as to sale.

the age of twenty-one years, the said trustees or trustee for the time being shall offer to sell to my said sons William and Thomas, or in case of the refusal or previous death of either of them, then to the other of them, (as the case may be), for such price as the trustees or trustee for the time being shall think fair and reasonable, my said business of , and all my interest therein, and all the stock and effects for the time being employed therein, and all messuages, workshops, warehouses, and premises for the time being employed in or connected with the carrying on of the said business. Provided nevertheless, that my said sons William and Thomas, or either of them, (as the case may be), shall not in such case be required to pay any consideration for the good will or custom of the said business; and in case of the refusal of each of them my said sons William and Thomas, or the survivor of them, to purchase the same when offered for sale to them, or either of them as aforesaid, then I direct, that the said trustees or trustee for the time being shall forthwith absolutely sell and dispose of the said business, stock and effects, messuages, workshops, warehouses, and premises, to any person or persons willing to purchase the same, for such price or prices as the said trustees or trustee for the time being shall think Sons, if purchasers, not to pay for good will thereto.

reasonable. And I do hereby declare, if the Security to be taken for person or persons purchasing the said business, purchase stock and effects, workshops, warehouses, and money.

premises, shall not pay down the price or consideration in money for the same, it shall be lawful for the said trustees or trustee for the time being to accept, as a security for the payment of the said price or consideration, or of so much thereof as shall not be paid down, with interest for the same in the mean time, after the rate of 5*l.* for every 100*l.* by the year, a mortgage of the hereditaments and premises so purchased, (except the said business, and the stock and effects for the time being employed in carrying on the said business), and also such other real or personal security as they or he the said trustees or trustee for the time being shall think proper to accept. And I further declare, that the securities to be given by any person or persons so purchasing as aforesaid, shall be rendered for such time, and upon such terms and conditions, and given up or varied for such other securities of the like, or a similar, or a sufficient nature, as they or he the said trustees or trustee for the time being shall think proper. And I do hereby further declare, that if the persons or person purchasing the said business, stock and effects, workshop, warehouses, and premises, shall be my said Sons, if purchasers, to have certain advantages.

sons William and Thomas, or either of them, then they or he so purchasing as aforesaid, shall not be bound or obliged (except in the event of money being wanted for the advancement of any one or more of my present or future born sons, as hereinafter is mentioned,) to pay off in any one year more than £ , part of the money secured.

*Trustees to stand possessed of purchase money upon certain trusts.*

And I do hereby declare, that the said trustees or trustee for the time being shall stand and be possessed of and interested in the monies to arise from the sale of the said business and premises hereinbefore directed to be sold, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoies, and declarations hereinafter expressed and declared of and concerning the same.

*Authority to trustees to carry on business, or to discontinue the same.*

LVII. And whereas I now carry on the trade or business of a merchant, in partnership with Mr. A. B., and I may at the time of my decease continue so to do, or otherwise be concerned in other trade or business, or commercial or mercantile concerns; now, therefore, I do authorize and empower the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, to carry on, or join in carrying on, my trade, business, or concerns, or to discontinue the same, as to him or them shall seem prudent.

And I do hereby declare my will and mind to Powers for  
 be, that the said [trustees], and the survivor of ~~given to the~~<sup>that purpose</sup> them, and the executors, administrators, and trustees.  
 assigns of such survivor, do and shall (if they or he shall be of opinion it will be most beneficial so to do) conduct, manage, and carry on the said trade, business, or concern, and transact all matters and things relating thereto, or co-operate and concur therein, in such manner as they or he shall think most conducive to the advantage of the persons beneficially interested therein; or to my share and interest therein; and do and shall, for that purpose, use and employ such persons, with such salaries, as they or he shall think proper. Provided Provisions also, and I do hereby declare my will and mind for sons to take the to be, that if any of my present sons, or any after-born son I may happen to have, may live business eventually. to attain the age of twenty-one years, and if the portions or legacies herein provided for my said children shall not have become vested or payable, then I hereby direct my said trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, to put my said son or sons so attaining the age of twenty-one years, or such one or more of them as my said trustees or trustee for the time being shall think proper, into the full and complete possession of my said business, trade, or concerns; and to assign and make over to my said

Trustees to son or sons respectively, all securities, debts, assign debts, goods, effects, and premises, belonging to, or generally used, or employed in carrying on my said business, trade, or concerns, upon my said &c.

son or sons respectively, who shall so take my said business, trade, or concerns, giving security or securities to the satisfaction of my said trustees or trustee for the time being, for the payment of the portions or legacies hereby provided out of the said business, trade, or concerns, for my other children, as and when the same shall respectively become due and payable; and which securities may be the bond of such son or sons, if my said trustees or trustee shall think proper to accept the same\*.

As to the  
trade of the  
testator.

\* A partnership trade is determined by the death of the trader, unless the articles of co-partnership provide otherwise. would be of ill consequence to say, that, in articles of partnership in trade, where no provision for the death of either partner is made, they might subsist for the benefit of the executor, who may not have skill therein." *Pearce v. Chamberlain*, 2 Ves. 33. A trader may, by will, direct his executors to carry on his separate trade, either with his general assets, or he may set apart a particular fund, to be severed for that purpose from the general mass of his property. In case of subsequent bankruptcy, the rest of the testator's property will not be affected by the commission, nor will the creditors have any claim upon the general assets of the testator; but only to the extent to which they are rendered liable by the will. This principle was established by Lord Eldon, in *Garland's case*, 10 Ves. 110, overruling *Hankey v. Hammond*, Co. B. L. 74, 3 Madd. 148 (n). Though it might

**LVIII.** I direct that as soon as may be after Partnership my decease, my partnership concerns with my <sup>concerns to be settld.</sup>

be advanced in support of Lord Kenyon's decision, that the testator appeared in that case to have made his *general assets* applicable to the purposes of the trade.

Where a testator directs only a certain portion of his property to be employed in trade, his executor is not authorized in employing one shilling of the assets beyond such sum. And whatever is so employed is in breach of trust. *Ex parte Richardson*, 3 Madd. 138.

Unless an executor carry on the trade of his testator, under the direction of the Court of Chancery, he will render his own private property liable to the creditors, in case of the insolvency of the concern. But he will not be allowed to derive any benefit from the trade, in case it be productive.

Should an executor, without any authority from the will, venture to trade with the property of the testator, he will be guilty of breach of trust, and liable to all its consequences. The parties claiming under the will, will be entitled to receive interest thereon, at the rate of £5 per cent.; or to receive the profits, which ever may happen to be most advantageous. *Heathcote v. Hulme*, 1 Jac. & W. 122. On a commission against such executor, the creditors and legatees of the testator may prove, in respect of the assets wasted by him. And those assets which can be distinguished as part of the testator's effects, will not pass by the assignment of the commissioners. But an executor, by merely disposing in the way of trade, of the stock of a trader, does not render himself liable to the bankrupt laws. If an executor, who is the representative of a wine-merchant, should find it necessary to buy wines in order to refine the stock left by the testator, this act will not make him a trader. But if he buy wines himself, and sell them to customers entire, it will be otherwise. *Ex parte Nutt*, 1 Atk. 102.

In the drawing of a will, under which the executors are desired to carry on the trade of the testator, the clauses should be very specially penned, so as to give full indemnity against

Directions  
as to the  
balance be-  
longing to  
testator.

partner John T. may be settled in the most honourable and liberal manner. And as for the balance which may be coming to me, the same may be paid to my executors in manner hereinafter mentioned; that is to say; by our partnership articles, the same is to carry interest, after the rate of *per cent.* for the term of one year after my decease; and I direct the same to remain in the hands of the said John T. for the said term of one year, at that rate of interest. And after the expiration of the said term of one year, I direct that the same may remain in the hands of the said John T. for any term of years he shall think proper, (not exceeding (7) years from my decease), with interest for the same after the rate of *per centum per annum*, to be secured by a bond

the losses which may result by the unforeseen contingencies or difficulties of the trade, and the executors should also be armed with the power of relinquishing the trade at their discretion.

\*A bankrupt executor will be admitted to prove as a creditor against his own estate, an order being first obtained for that purpose. But the court will not suffer the money to come into the hands of the bankrupt, but the dividends will be directed to be paid into the bank. *Ex parte Leake*, 2 Bro. C. C. 596. *Ex parte Shakeshaft*, 3 Bro. C. C. 197. *Re Howard* and another, 1 Glyn and J. 126. However, an application to the Chancellor is the first step to be taken. A special order will be made, according to circumstances, and in some cases the Chancellor may think proper that the assignees under the commission, or a creditor of the testator, or a legatee, should join with the executor in the proof. See 2 Christ, B. L. 339.

or obligation, in a sufficient penalty, to be executed and given by him to my said trustees.

LIX. And whereas my son J. B. may wish Trustees to engage in some trade or manufacture, alone, sum of or in partnership, in which a sum of money, in money to addition to his actual fortune, may be wanted able him to to carry on the same with spirit and effect. engage in Now I do hereby direct, that it shall be lawful for the said [*trustees*], and the survivor of them, and the executors, administrators and assigns of such survivor, at their or his discretion, to advance to my son, from my personality, any sum or sums of money, (not exceeding in the whole the sum of £      either on landed security, Directions or upon the security of his own bond, or on as to the security of the joint and several bond of principal, himself and his partner or partners. And the repayment security so to be given for the said sum shall thereof. be for the repayment of the same, with lawful interest, in the manner and at the times hereinafter mentioned ; that is to say ; the principal shall be paid by instalments of £      per cent. on the capital in every year, and the accruing interest of the capital from time to time remaining due, shall be payable half yearly. And my will is also, that if the repayment of the same shall not be secured on landed property, the same, or such part thereof as shall not be secured on landed property, shall (to

the extent of £ if the whole sum shall be advanced, or to the whole amount of the money, if it shall not exceed that sum,) be further secured, by two policies of assurance, to be effected in the life-time of the said J. B.; one of which shall be effected at the office, for the sum of £ , and the other at the office, for £ , and in proportion for any less sum than £ , which may be advanced to my said son. And it is my will, that the said assurances shall be effected at the expense of my said son; and that my said son shall pay the fines and expenses of keeping the said policies, as a security for the money which shall be advanced to my said son, and the interest thereof, and subject thereto, in trust, for my said son, his executors, administrators, and assigns, for his and their proper use and benefit.

Declaration  
as to losses  
and ex-  
penses.

**LX.** And I do hereby expressly direct, that all losses, charges, and expenses of carrying on managing and conducting the said business, shall be borne and paid by my said trustees or trustee, with and out of the monies which shall come to their or his hands by virtue of this my will.

General  
powers given  
to trustees.

**LXI.** And I expressly declare, that the said trustees or trustee for the time being shall

have the fullest powers over the said business which I can give them by this my will, so as to enable my said trustees or trustee to carry on, manage, and conduct the said business, in the same manner, to all effects, constructions, and purposes as I myself could do if I were living and acting therein.

LXII. And I give to my said trustees or trustee full power and authority to enter into such contracts and agreements respecting the said business and premises as they or he shall think proper, and to increase or abridge the said business, and to make such sales and dispositions of all or any part or parts of the stock and effects, workshops, warehouses, and premises, now or hereafter to be employed in, or connected with the carrying on of the said business. And with and out of the profits to arise out of the said business, and also with and out of all or any of the monies which shall come to their or his hands by virtue of this my will, to make such purchase or purchases of stock and effects as they or he the said trustees or trustee for the time being shall think proper. And also to adjust and settle all accounts and transactions which I shall be interested in at the time of my decease. And to compromise and compound any debts owing to me, or claimed from me, relative to the said business.

And generally to transact all matters and concerns respecting the said business and premises, and to do and execute, or cause to be done and executed, all such acts and deeds relative thereto, in such and the same manner, to all effects, constructions, and purposes, as if they or he were absolutely entitled to or interested in the said business.

Power to  
increase,  
abridge, or  
discontinue  
the trade.

**LXIII.** Provided always, And I do hereby expressly declare, that it shall be lawful for the said trustees or trustee to discontinue the said business at any time, whilst the same shall be carried on by them or him, in pursuance of this my will. And also to increase or partially abridge the said business, from time to time, according to their and his discretion; it being my intention to give to my said trustees and trustee full power and authority to carry on my said trade, business, or concerns, or wholly to discontinue the same, as to them or him shall seem most advantageous.

Appropria-  
tion of capi-

**LXIV.** And I direct that the capital and stock already employed in my said trade or business shall continue to be employed therein, and that the remainder of my estate and effects shall not be affected by the said trade.

Ibid.

**LXV.** And I direct that my said trustees

shall be authorized to employ the sum of £ , part of my estate and effects, in the said trade or business, and that such sum and no more shall form the original capital in the said trade.

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#### PROVISION FOR CHILDREN, &c. OUT OF PERSONAL ESTATE, OR OUT OF MONEY ARISING FROM SALE OF REAL ESTATE.

LXVI. I give and bequeath all my goods, Bequest of chattels, capital, and stock in trade, money, personal estate to and securities for money, debts, and all other trustees. my personal estate and effects of what kind soever, of, in, or to which I, or any person or persons in trust for me, shall be entitled at the time of my decease, (except such part or parts thereof as I shall or may by this my will, or by any codicil or codicils thereto dispose of specifically or otherwise,) unto the said [*trustees*], their executors, administrators, or assigns, upon the trusts, and for the intents and purposes hereinafter expressed or declared, of and concerning the same; that is to say; Upon trust, Upon trust that they the said [*trustees*], and the survivor to sell and convert of them, and the executors, administrators, and same into assigns of such survivor, do and shall, with all convenient speed after my decease, sell, dispose of, and convert into money so much thereof as

shall be in its nature saleable, and collect, get in, and receive the residue thereof, or continue the same or any part thereof respectively, in its actual state of investment, or call in and convert the same into money. And lay out and invest the money arising thereby in their or his names or name in the purchase of a competent share or competent shares of the parliamentary stocks or public funds of Great Britain, or at interest on government or real securities in England or Wales. And do and shall from time to time, alter, vary, and transfer the same for or into other stocks, funds or securities, when and so often as they or he shall think fit.

Declaration  
as to money  
arising  
thereby.

And I direct, that every such calling in, sale, alteration, variation, or transfer, shall, during the joint lives of the said , be made with the consent, in writing, of both of them, the said and , and after the decease of such of them, the said and , as shall first depart this life, shall, during the life of the survivor of them, be made with his or her consent in writing; and after the decease of such survivor, shall be made, at the discretion and of the proper authority of the said [*trustees*], or the survivor of them, or the executors, administrators, or assigns of such survivor. And I declare, that the said trustees or trustee for the time being, shall stand and be possessed of, and interested in,

the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, upon and for the trusts, intents, and purposes hereinafter expressed and declared, of and concerning the same, that is to say, in trust, &c.

LXVII. And I declare, that the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall stand and be possessed of, and interested in, all the money to arise from the sale or sales hereinbefore by me directed to be made of my real and leasehold estates, or to arise and be produced from that part of my personal estate which I have directed to be converted into money. And of and in the monies, government securities, stocks, or funds, and mortgages on real estates, of or to which I shall be possessed or entitled at the time of my decease, and of and in the rents, issues, and profits, interest, dividends, and annual produce thereof, until the same shall be respectively disposed of, and converted into money; Upon trust [to invest in securities, &c. *see clause LXVI.*]

LXVIII. And as to the residue or surplus *Ibid.* of the money which shall come to the hands of my said trustees, or the survivor of them, or the executors, administrators, or assigns of such

survivor, by sale of my said freehold, leasehold, and real estates, and by collecting, getting in, and receiving my said personal estate, in manner hereinbefore directed, and which shall remain after answering and satisfying the trusts and purposes hereinbefore declared, of and concerning the same. I do hereby declare, that the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall lay out and invest the same, &c. [to invest in securities, &c. see clause LXVI.]

[Where investment of money in the funds, and on securities, has been previously directed, repetition may be saved, by adopting the following clause, as occasion requires.]

Investment  
of trust  
monies.

**LXIX.** Upon trust, that they the said trustees or trustee for the time being, do and shall lay out and invest the said sum of £ [or the money arising from such sale or sales as aforesaid] in their or his names or name, in any of the stocks, funds, and securities hereinbefore mentioned, and from time to time, at their or his own discretion, alter and vary the said last mentioned trust monies into other stocks, funds, and securities of a like nature. And shall stand and be possessed of the same trust monies, and the stocks, funds, and securities

in which the same shall be invested, and the interest and dividends thereof, Upon trust, &c.

LXX. And I declare, that the said [trustees], and the survivor of them, and the executors, administrators, or assigns of such survivor, shall stand and be possessed of and interested in the said trust monies, and the stocks, funds, and securities, in which the same shall be invested, and the interest, dividends, and annual produce thereof upon and for the trusts, intents, and purposes herein-after expressed and declared of and concerning the same; that is to say:

LXXI. In trust for all and every my present and future born children, during their respective lives, in equal shares. But in respect to the share or shares of my daughter or daughters who shall at any time or times be under coverture, In trust for the sole and separate use of such daughter or daughters during such time or times as she or they shall be so under coverture, and the receipts or receipts of such daughter or daughters, or of her or their appointees, shall be sufficient discharges for the interest, dividends, and annual produce which shall become due during her or their coverture or respective covertures, in respect of her or their share or respective

Trustees to stand possessed of trust monies, &c.

In trust for all the children equally for their lives.

As to the shares of married daughters, for their separate use.

shares in the said trust monies, stocks, funds, and securities; and after the decease of each of my said children, the said trustees or trustee for the time being shall stand and be possessed of and interested in the share to which the child so dying shall become entitled during his or her life as aforesaid, of and in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof; In trust, for all and every such one or more exclusively of the others or other of his, her, or their issue, whether children or grandchildren, born in his or her lifetime, or in due time after, with such provisions for their respective maintenance, education, and advancement, and in such shares, if more than one, and with such restriction, and in such manner, as he or she shall by In default of deed or will appoint; and in default of such appointment, and so far as any such, if incomplete, shall not extend, In trust for all and every his or her children, who being a son or sons shall attain the age of twenty-one years; or being a daughter or daughters, shall attain the said age, or marry under that age, with the consent of his, her, or their parent or parents, or guardian or guardians, for the time being, to be divided between or amongst the said children, if more than one, in equal shares; and if but one, the whole to be In

After the  
decease of  
such child,

In trust for  
the issue,  
according to  
the parents'  
appointment.

In trust for  
sons at  
twenty-one,  
and for  
daughters  
at twenty-  
one, or mar-  
riage, equal-  
ly.

trust for that one or only child: And in case Trusts for  
 and so often as any of my said children shall surviving or  
 die without leaving issue of his or her body, shares  
 who, under the trusts aforesaid, shall become amongst  
 entitled during his or her life as aforesaid, testator's  
 children for life.

Then and in every such case, and so often as  
 the same shall happen, the said trustees or  
 trustee for the time being shall stand and be  
 possessed of, and interested in the share to  
 which such the child for the time being dying  
 without leaving issue as aforesaid shall become  
 entitled during his or her life, as well origin-  
 ally under the trusts aforesaid, as by survivor-  
 ship or accrue under this present clause; In  
 trust for the survivors or survivor of my said  
 children during their, his, or her respective  
 lives or life, and in equal shares if more than  
 one; but in respect to the share or shares of  
 such of the said survivors or survivor being a  
 daughter or daughters, who shall at any time  
 or times be under coverture; Upon such trusts As to the  
 for such daughters during such time or times surviving  
 as they or she shall be so under coverture, and and accrue-  
 with such power of giving receipts, as are ing shares  
 hereinbefore expressed and declared of and of married  
 concerning the original share or shares of such daughters  
 daughter or daughters. And after the de- After the de-  
 cease of each of such survivor, the said trus- cease of such  
 trustees or trustee for the time being shall stand survivor, the  
 and be possessed of, and interested in the sur- accruing  
 in trust for

the issue, living or accruing share to which such surviving according to the parents' will for the time being shall become entitled by appointment,

for his or her life, under the trusts aforesaid, in trust for all and every, or such one or more exclusively of the others or other of his or her issue, whether children or grandchildren, born in his or her life-time, or in due time after, with such provisions for their respective maintenance and education, and with such restrictions, and in such manner, as he or she shall

in default of by deed or will appoint; and in default of and appointment, until such appointment, and so far as any such,

In trust for sons at 21, if incomplete, shall not extend; In trust for daughters at 21, or who being a son or sons, shall attain the age marriage, equally.

of twenty-one years; or being a daughter or daughters, shall attain that age, or marry under that age with the consent of her or their parent or parents, or guardian or guardians for the time being, to be divided between or amongst the said children, if more than one, in equal shares; and if but one, the whole to

In case testator's children die without issue, be in trust for that one or only child. And in case all my said children shall die without leaving such issue as aforesaid, then, after the decease of the survivor of my said children,

and such failure of issue as aforesaid, the said trustees or trustee for the time being shall stand and be possessed of, and interested in, the said trust monies, stocks, funds, and se-

curities, and the interest, dividends, and annual produce thereof, upon the trusts following; that is to say; If my said wife shall then be dead, in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto; and to be divided between or amongst the same persons respectively, if more than one, in the shares in which the same would be divisible under the said statutes. But if my said wife shall then be living, then in trust for the person or persons who, under the said statutes, would be entitled thereto in case my said wife had then been dead, and to be divided between or amongst the same persons respectively, if more than one, in the shares in which the same would be divisible under the said statutes. Provided always, and I do hereby declare, that during the minority of any of my said children, the said trustees or trustee for the time being shall appropriate a competent part of the interest, dividends, and annual produce of the share or shares to which the child or children so under age shall, for the time being, be entitled during his, or her, or their life or respective lives, under the trusts aforesaid, in the said trust monies, stocks, funds, and securities, for the maintenance and education of such child or children; and shall pay to my said wife, during her

in trust, for the persons entitled, under the statutes of distribution, to the exclusion of wife.

Provision for maintenance and education of children during minority.

widowhood, the interest, dividends, and annual produce so directed to be appropriated as aforesaid; to be by her applied in such manner, for the maintenance and education of such child or children, as she shall think proper; and shall, after the death or marriage of my said wife, apply the interest, dividends, and annual produce thenceforth to be appropriated, under the directions aforesaid, in such manner for the maintenance and education of such child or children, as they the said trustees or trustee for the time being shall think proper, and shall accumulate in any of the said stocks,

**Residue of interest to accumulate.** the residue of the interest, dividends, and annual produce of the share or shares to which the child or children so under age shall for the time being be entitled, during his, her, or their life or respective lives, under the trusts aforesaid; and shall stand and be possessed of the respective accumulations upon the trusts declared by this my will, of and concerning the funds from which such accumulations shall

**Provision for advancement of each child.** have respectively proceeded. Provided always, and I further declare, that it shall be lawful for the said trustees or trustee for the time being, at any time or times, to apply any part or parts, not exceeding one half of the share or shares to which my said child or children shall for the time being be entitled during his,

her, or their life or respective lives, under the trusts aforesaid, in the said trust monies, stocks, funds, and securities, for or towards his, her, or their preferment or advancement in the world, or otherwise for his, her, or their benefit. And I do hereby declare, that the rents Direction as to rents of and annual profits of the premises herein-before directed to be sold, or of such part thereof sold. premises till as shall for the time being remain unsold, shall, until the sale or sales thereof, be applied by the said trustees or trustee for the time being to the same purposes, and in the same manner, to and in which the interest, dividends, and annual produce of the monies to arise from such sale or sales are herein-before directed to be applied.

LXXII. In trust, for all and every the children and child of my body, now born or hereafter to be born, who being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or marry under that age (with the consent of her or their guardian or guardians respectively), and their respective executors, administrators, and assigns, to be divided between or among them, if more than one, in equal shares and proportions; save and except, that if any one Exception of my said children, being a son, shall attain in favour of an eldest son, who the age of twenty-one years, and I shall have

shall have a any other son or sons who shall attain that age, double portion.

or any daughter or daughters who shall attain that age, or marry under that age (with such consent as aforesaid), then and in that case such eldest or only son so attaining the age of twenty-one years, shall have double the portion of any other such child; and if none of my daughters shall attain the age of twenty-one years, or marry with such consent as aforesaid,

If all the children die except one, such one to have all the trust monies.

and one only of my sons shall attain the age of twenty-one years, then the whole of the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, shall be in trust for such only son; and if none of my sons shall attain the age of twenty-one years, and one only of my daughters shall attain the age of twenty-one years, or marry with such consent as aforesaid, then and in that case the whole of the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof respectively, shall be in trust for that only daughter.

Provision for maintenance and education of children. And I do hereby declare my will and mind to be, that in the meantime, and until the vesting or payment of the portions hereby provided for my said children respectively as aforesaid, they the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, shall and may [but subject and without prejudice to the payment of the

said annual sum of £ , or £  
 to my said wife, as the case may happen to be],  
 by, with, and out of the interest, dividends, and  
 annual produce of the said trust-monies, stocks,  
 funds, and securities respectively, raise and pay  
 such sum and sums of money as they or he shall  
 think proper, for or towards the maintenance  
 and education of my said children for the time  
 being, but not exceeding in any one year the  
 sum of £ for my eldest or only sur-  
 viving son for the time being, and the sum of  
 £ for any one of my other sons, and  
 the sum of £ for any one of my other  
 daughters; and also shall and may (but subject and for their  
 and without prejudice as aforesaid) advance  
 any sum or sums of money they or he may think  
 proper out of the said trust monies, stocks,  
 funds, and securities respectively, for or towards  
 the placing out or advancement in the world of  
 any one or more of my said sons during his or  
 their minority, or respective minorities, not ex-  
 ceeding the principal sum of £ , for  
 my eldest or only surviving son for the time  
 being, and the sum of £ for any one  
 of my other sons. And my will is, that the  
 money so to be paid for advancement as afore-  
 said, shall be taken as part of the portion or  
 portions hereby provided for the son or sons  
 to or on account of whom the same shall re-  
 spectively be paid. Provided always, and I do

K

such ad-  
vancement  
to be taken  
in part of  
portions.

If any daughter hereby declare my will and mind to be, that if marry with any daughter or daughters of my body, being out consent, under the age of twenty-one years, shall marry without the consent of her or their guardian or guardians for the time being\*, then and in any

As to conditions in restraint of marriage.

\* An injunction to ask consent is lawful, as not restraining marriage generally; but a condition absolutely enjoining celibacy, tantamount to a prohibition of marriage, is a void condition. A condition prescribing due ceremonies and place of marriage, is good; still more is a condition good which only limits the time to twenty-one, or any other reasonable age, provided it be not used evasively as a cover, intending to restrain marriage generally. *Scott v. Tyler*, 2 Bro. Ch. Ca. 431. Lord Mansfield has observed, that conditions in restraint of marriage are odious, and are therefore held with the utmost rigour and strictness. These conditions have been considered as unfavourable to the good order of society, and have been held to be only *in terrorem*. Yet it was never seriously supposed to be a testator's intention to hold out the terror of that which he never meant to happen; but the court has made such conditions amount to no more, although provisions against improvident marriages during infancy, or to a certain age, could not be thought an unreasonable precaution for parents to use. *Ibid.*

Conditions affecting personal and pecuniary legacies.

If a pecuniary legacy be given on condition of marriage, with consent, and there is no bequest over, such condition is void. *Bellasie v. Ermine*, 1 Ch. Ca. 22. *Garrett v. Pritty*, 2 Vern. 293; where it is said, the daughter shall have the whole 3,000*l.* though she married without consent; because it is not devised over, but only directed to fall into the surplus; but in the subsequent case of *Amos v. Hamer*, Eq. Ca. Abr. 112, it is held, that the devise of the surplus of the personal estate is a devise over. *Daley v. Desbouverie*, 2 Atk. 261. *Rhenish v. Martin*, 1 Wils. 130. And, in a late case, the principle was again acknowledged, that when there is a bequest of personal property upon a condition subsequent, and no bequest over on breach of

and every such case, they the said [trustees], and the survivor of them, and the executors,

the condition, the condition is considered only *in terrorem*. *Marples and others v Bainbridge and others*, 1 Madd. 590.

A condition subsequent in respect to a legacy being *in terrorem*, will not divest the legacy which has been already vested, but a condition precedent, in respect to such legacy, *though in terrorem*, will prevent the legacy from vesting until the marriage be performed, though it should be had without any consent obtained. *Garbut v. Hilton*, 1 Atk. 381. *Atkins v. Hiccocks*, 1 Atk. 500.

"The true ground upon which the court has suffered the restriction of a testator to effectuate, is not the intention, but the right of a third person, the being given over and vesting in that third person, if the condition is not performed." *Wheeler v. Bingham*, 3 Atk. 364. Lord Hardwicke was of opinion that an express devise, "that if the legatee should not perform the condition, the legacy should sink into the residuum," amounts to a devise over. But there must be an express bequest over of the particular legacy, and a bare gift of the residuum will not be sufficient. The reason is, that when a testator makes a residuary legatee, he has not that particular thing in his view or contemplation. *S. C. 1 Wils.* 137. A mere residuary bequest is not a sufficient disposition over in the event of a breach of the condition, but a declaration by the testator, that on the happening of the condition, the legacy shall fall into the residue, is an express disposition over. *Lloyd v. Branton*; 3 Meriv. 117.

In all cases of legacies, where there is a bequest over, the right of the person claiming under such bequest, will prevail, whether the condition be precedent or subsequent. *Stratton v. Grimes*, 2 Vern. 357. *Wrottesley v. Wrottesley*, 2 Atk. 584. *Chauncey v. Graydon*, 2 Atk. 616. If a condition be precedent, and substitute a less for a greater legacy, the larger legacy cannot vest, but the less will vest; the condition in such case not being considered *in terrorem*. *Gillet v. Wray*, 1 P. Wms. 284.

It is said, the civil law has no such distinctions as that of

administrators, or assigns of such survivor, shall thenceforth stand and be possessed of

conditions precedent; it is true, they have no such term, but they have the thing in effect. *Conditio* (they say) *suspendit legatum*. Pecuniary legacies being suable for in the spiritual court, is the reason why that law, in some respects, governs as to them. But it is undoubtedly true, that the Court of Chancery has not universally followed the maxim of the civil law, even upon this point, ~~for~~ it has been always agreed, that where there is a devise over it shall take effect. *Harvey v. Aston*, 1 Atk. 375. But in the Ecclesiastical Court, the rule, "that where a personal legacy is given to a child, on condition of marrying with consent, such condition is not to be taken as annexed to the legacy, but as a declaration of the testator *in terrorem*," is so strictly adhered to, that the marrying without consent is not considered there as a breach of the condition, *although the legacy is actually given over*. But that rule has not been carried so far in the Court of Chancery. The reason of the difference is, because the civil law, considering the condition, whether precedent or subsequent, as unlawful, and absolutely void, the legacy stands pure and simple. *Reynish v. Martin*, 3 Atk. 331.

As to conditions in restraint of marriage affecting real estate, and portions charged upon real estate.

The jurisdiction of the Ecclesiastical Court has never been applied to conditions annexed to real estate. The Court of Chancery considers money directed to be laid out in land as land, and this is likewise exempt from the ecclesiastical law. The same rule applies to portions charged upon, or interests arising out of land. *Pullen v. Ready*, 2 Atk. 587. *Harvey v. Aston*, 1 Atk. 378.

It may be laid down as a general rule, that with respect to real estate, or to charges to be raised out of real estate, if the condition in restraint of marriage be precedent, it must be strictly performed, to entitle the party claiming to the benefit of such charge, but if the condition be subsequent, its validity will depend on being such as the law will allow to devest an estate. Nothing is more fixed since the case of *Pawlet v. Pawlet*, 1 Vern. 204, and 2 Vent. 397, than that portions charged on lands will not vest till the time of payment comes, which may be by a testator fixed to the time of a marriage with consent. The question is,

and interested in the portion or portions to which, either originally or by survivorship or

whether such condition is *in terrorem* only; and it has been held, that such rule applies to legacies only and not to portions. Portions arising out of lands have nothing testamentary in them, and are subject only to the rules of the common law. A material difference between portions out of lands and personal legacies, is, that, in the first case, if the party dies before they become payable, they shall not be raised, in the latter, the legacy shall go to the executor; and the ground of this distinction is, that the Court of Chancery, for uniformity, follows the Ecclesiastical Courts in the one case, and the common law in the other. If the condition in restraint of marriage be a condition subsequent, the breach of the condition devests the estate before vested. *Fry v. Porter*, 1 Mod. 300. 1 Ch. Ca. 138. *Pullen v. Ready, supra.* *Harvey v. Aston, supra.* The general doctrine has always been, that, in case of portions arising out of land, the court can give no relief, nor can take away, or set aside such conditions as are annexed. And in the case of *Pawlet v. Pawlet*, it was so determined. On gifts or devises of the inheritance, or freehold of lands, almost any condition or limitation, however, restricting the right of marriage, unless it amounts to a prohibition of ever marrying, that is, to an absolute injunction of celibacy, has been considered as effectual. *Scott v. Tyler, supra.* *Stackpole v. Beaumont*, 3 Ves. 89.

Where the estate is to arise upon a condition precedent, it As to con-  
cannot vest till that condition is performed, and this has been so ditions pre-  
strongly adhered to, that even where the condition is become im-  
possible, no estate or interest shall grow thereon, because, as a  
precedent condition to increase an estate must be performed,  
so if it become impossible no estate shall arise. Co. Litt.  
206 a. 218 a. Thus, if an estate for life be limited to A. upon  
his marriage with B.; the marriage is a precedent condition, and  
till that happens no estate is vested in A. And where an estate  
was devised to trustees upon trust, as long as the testator's son  
should continue unmarried, to pay the rents to him; and in case  
of his marriage with the consent of the trustees, or the survivor  
of them, or his heirs, (save as to his marrying a certain indivi-

by accrue, such daughter or daughters would, if she or they had attained her or their age or

dual), then, in trust to convey the estates to him, his heirs, and assigns. But if he should marry the prescribed individual, or marry *against* the consent of the trustees, or the survivor or them, &c. then the estate was to be sold, and the produce to be divided amongst other persons. The son married without communicating his intention to either of the trustees, and the marriage took place without their knowledge; but as soon as they heard of it, they expressed their disapprobation. It was held, that to entitle himself to the estate after marriage, the son must marry with the consent of the trustees. But that he had not performed that condition precedent. The expression "*against* the consent of the trustees," was, to make the will consistent, construed to mean "*without*" their consent. *Long v. Ricketts*, 2 Sim. & Stu. 179. If the performance of such precedent condition becomes impossible by the act of God, the estate will never vest. As where the condition was, that in case the Duke of Southampton should marry the daughter of Sir H. Wood, and they had issue male, then the trustees should stand seised to the use of the Duke during his life. The marriage did take effect, but the Duchess died without issue, and it was held that the Duke was not entitled to a life estate. *Shaw, Parl. Ca.* 83. *Gillett v. Wray*, 1 P. Wms. 284. *Roundel v. Currer*, 2 Bro. Ch. Ca. 67. *Lord Falkland v. Bertie*, 2 Vern. 333, 339, 340.

As to conditions subsequent.

It is the constant rule of law in the case of conditions subsequent, that if the performance becomes impossible by the act of God, the condition is absolutely void. In Co. Litt. 206 a, it is laid down, that in case of a feoffment in fee with a condition subsequent, which is impossible, the estate of a feoffee is absolute. Therefore in *Thomas v. Howell*, 1 Salk. 170, where one devised to his eldest daughter, upon condition she should marry his nephew on or before she attained the age of twenty-one; the nephew died young, and the daughter never refused, and indeed never was required to marry him. After the death of the nephew, the daughter being about seventeen, married J. S. And it was adjudged in the Common Pleas, that the condition was not broken, being become impossible by the act of God; and

respective ages of twenty-one years, without having been married, have thereupon become

the judgment was afterwards affirmed in error in the King's Bench. And in *Aislabie v. Rice*, 3 Madd. 256, where the condition as to marriage with consent, was a condition subsequent, and a compliance with it was, by the death of the parties before the marriage of the devisee, become impossible by the act of God; it was held, that her estate for life became absolute, and that she might execute a power of appointment of the real estate given to her by the will, in case she married with the consent of the trustees. And again, a marriage being required to be had with the consent of two executors, on the death of one, the legatee of personal estate, without the consent of the surviving executor, married with a common mariner; as the condition was a subsequent condition, and became impossible by the act of God, the legatee was discharged from the performance, and was decreed to be entitled to the legacy; the court observing, that the testator might have added, that the marriage should have been with the consent of the executors, or of the *survivor of them*, but he might also have omitted the words upon good reason, as intending both executors should confer together about the marriage, in order that the one by arguments might convince the other, touching the suitableness of the match; the court therefore would not add words which the testator had omitted. *Peyton v. Bury*, 2 P. Wms. 625. The condition of marrying in *Jones v. Suffolk*, 1 Bro. Ch. Ca. 527, required the consent of the mother, and in *default of the mother*, the consent of the guardians to be first had and obtained. The testator appointed the mother and her father joint executors of his will and guardians of his children, the mother died, and one of the daughters married without consent. Lord Thurlow said, the case of *Peyton v. Bury* (*supra*) goes a great way; that case, while it stands, is of weight, but I should have much hesitation to decide upon it. When it is said that conditions to defeat an estate are odious I feel it, but it is a disagreeable argument to guide a decision; what one person may think odious, another may judge of differently; the decision must depend upon the feelings

entitled, upon the trusts hereinafter expressed  
and contained of and concerning the same;

of the judge; I should therefore be sorry to go upon the odiousness of the condition. His lordship, however, after some hesitation, declared his opinion, that the daughter was entitled. It should nevertheless be observed, that the intention of the testator throughout the will was very imperfectly and inadequately expressed, and it did not appear that the circumstance which had occurred was in his contemplation at the time he wrote the will. So far therefore this decision does not seem to confirm the case of *Peyton v. Bury*.

It is an established proposition, that a marriage in the life-time of the father, with his consent or subsequent approbation, is equivalent to a marriage after his death with the consent of the trustees.

In *Parnell v. Lyon*, 1 Ves. & Bea. 479, the testator declared that if any of his daughters should marry before they should attain the age of thirty years, with the consent and approbation of any two of his executors, or of any one of his executors, if there should be but one then living, her portion should immediately become vested in her; but if any of his daughters should marry without such consent, her portion should continue out at interest for her life and the interest be paid to her yearly, but the principal should go to her brothers and sisters. One of the daughters married in the father's life-time under age. Sir W. Grant held, on the authority of the two last-mentioned cases, that if this was a marriage with the consent of the father, it was equivalent to a marriage with the consent of the executors after his death. An inquiry was however directed as to the fact, whether the marriage was with the consent of the father; and the master was directed to state any special circumstances, as whether the father afterwards approved of the marriage. In *Clarke v. Berkeley*, 2 Vern. 720, under a devise upon trust to convey to the testator's daughter, in case she married with the consent of two of the trustees and her mother, and if she died before marriage, or married without such consent, to other uses; the daughter having married in the father's life-time with his

that is to say; Upon trust, that they the said <sup>The portion  
of such</sup> trustees, and the survivor of them, and the daughter so

consent, a conveyance according to the will was decreed, the testator's own consent being considered as dispensing with the condition. In *Crommelin v. Crommelin*, 3 Ves. 227, Lord Rosslyn proceeded upon the same principle, holding such a condition not applicable to a daughter who married and became a widow during the father's life. See also *Wheeler v. Warner* and others, 1 Sim. & Stu. 304.

Where consent to marriage is required, no precise form is necessary. If the consent is directed to be in writing, a parol consent will not be sufficient, but no precise form is required: one may delegate his authority to the others. Consent whether by parol or writing, if withheld on unreasonable grounds, is dispensed with in equity. *Harvey v. Aston*, 1 Atk. 361. *D'Aguilar v. Drinkwater*, 2 Ves. & Bea. 225. *Dashwood v. Lord Bulkeley*, 10 Ves. 230. *Clark v. Parker*, 19 Ves. 1.

If trustees consent conditionally to a marriage upon the offer of a settlement being made, they are justified in retracting that consent, on a subsequent refusal to make the settlement; it would be going too far to say, it cannot be withdrawn for any reason, good or bad. Many reasons might operate against individual consent, into which the court could not providently inquire, and which it would be quite competent to the party to refuse to disclose. *Clarke v. Parker*, *supra*. But a consent to marriage being once given, cannot be withdrawn by adding terms, that do not go to the propriety of giving the consent, and a settlement made, even after marriage, is sufficient, where the consent is given upon the offer of a settlement. *Dashwood v. Bulkeley*, 10 Ves. 231. *O'Callaghan v. Cooper*, 5 Ves. 117; and see *Fry v. Porter*, 1 Mod. 310. *Merry v. Rynes*, 1 Eden 1. Where the consent is not required to be in writing, a consent after the marriage has been held sufficient. *Mercer v. Hall*, 4 Bro. Ch. Ca. 326. And where a legacy was given on condition of the legatee marrying with the consent of the testator's trustees, or the survivor of them, first had and obtained in writing under his or their hand, or hands; and it was declared, if the

marrying to executors, administrators, and assigns of such  
be held for her separate survivor, shall, during the respective life of  
use.

legatee should marry without the consent of the trustees, or the survivor of them, first had and obtained in writing, as before mentioned, or in case he should, with or without their consent, marry any one of certain individuals named in his will, then that the legatee should not be entitled to any part of the property bequeathed for his benefit. One of the trustees alone acted in the execution of the trusts, the other trustee refusing to act in any manner in the trusts of the will; after the testator's death, the legatee married a lady, who was not of the family prohibited by the testator; previously to the marriage, the legatee applied for the consent of both trustees, and an instrument in the form of a deed poll was prepared, reciting the clause in the will and the intended marriage, and expressing a formal consent to it by the two trustees. The instrument was executed by the acting trustee, but the other trustee, though he expressed his perfect consent to the marriage, declined executing the instrument, lest he should be considered, as taking upon himself the trusts of the will. The marriage, in fact, took place some time before the acting trustee signed the instrument; the trustee admitted in his answer, that the marriage was with his consent, and that he would have signed the instrument before the marriage, if he had thought it would have taken place so soon; the other trustee acknowledged, that in all other respects, except in the apprehension of implicating himself in the trusts of the will, he approved of the deed poll, and, had he been an acting trustee, he would have signed any paper testifying his consent to the marriage. The day before the marriage, the acting trustee wrote a letter to the legatee, stating, that he would as early as possible on the following morning, call upon the other trustee, and bring the proper consent to the legatee, and at the same time signifying in the letter his own consent to the marriage. On an inquiry before the master, it was proved, that the other trustee had never acted, and had refused to sign only for the reasons already stated; but that he, as well as the acting trustee, approved of the marriage. The

any, and each, or every the daughter so marrying without consent as aforesaid, pay the in-

Vice Chancellor made a decree in favour of the legatee, holding, according to the intimation of Lord *Eldon's* opinion in *Clarke v. Parker, supra*, that the authority to consent was annexed to the office of trustee, and like other authorities annexed to that office, vested in the single trustee who acted. The letter written by the acting trustee the day before the marriage was considered as a sufficient consent in writing; but if there had not been such letter, in as much as the formal consent in writing would have been executed by him, except on account of an accidental delay, and not on account of any change of purpose, the court would have considered the consent of the acting trustee to be substantially given according to the will, although the instrument was signed after the marriage, because he had previously expressed his full approbation of the marriage. *Worthington v. Evans*, 1 Sim. & Stu. 165.

A condition to marry or not to marry a particular person is good. *Scott v. Tyler*, 2 Bro. Ch. Ca. 431. And even a condition not to marry any individual of a certain nation, is a lawful condition, as being only a partial restraint of marriage. Thus, where a testator declared, that if either his wife or daughter should marry a Scotchman, then they should forfeit all benefit under his will, and the estates given to such his wife or daughter as should so marry, should descend to such person as would be entitled under his will, in the same manner as if his wife or daughter were dead. The daughter, who married a Scotchman died, leaving a son. The son could not inherit the property, nor the husband be tenant by the courtesy. *Perryn v. Lyon*, 9 East Rep. 170.

A condition that a widow shall not marry, is lawful. *Jordan v. Holkham*, Ambl. 209. *Barton v. Barton*, 2 Vern. 308. *Scott v. Tyler*, 2 Bro. Ch. Ca. 488. But where a testator bequeathed to his wife, "should she survive and continue unmarried, all his goods, chattels, estate and effects, at the time of his death, to use, occupy and possess the same, during the term of her natural life, and from and immediately after her death"—the testa-

terest, dividends, and annual produce of the portion or portions to which she or they respectively would have been entitled as aforesaid, if she or they had attained the age of twenty-one years (or married with such consent as aforesaid), to such person or persons, and upon and for such intents and purposes as such daughter or daughters, notwithstanding her or their marriage or respective marriages, or any subsequent marriage or marriages, shall, by any writing or writings to be by her or them respectively signed, after the said interest, dividends, and annual produce shall become due, direct or appoint, and so that she or they shall and may not in any wise dispose of or affect

tor disposed of the same to certain persons named in his will; on the death of the testator, the widow took possession of the property and afterwards married. The court decided, that the testator's wife was entitled to the property during her life, but the persons in remainder were enabled to require an account, and to have the property secured; the condition was considered only *in terrorem*. There was no bequest over in breach of the condition, though it was argued, that this was not a condition but a bequest till the second marriage; the court said, the distinction was too refined, the language imported a condition, just as much as if the words used were, *if* or *provided* she continued unmarried; it was therefore considered as a condition subsequent. *Marples v. Bainbridge*, 1 Madd. 590.

In conclusion, it may be observed, that, in Wills, a condition is construed to be precedent or subsequent, as the intent of the testator may require. The question always is, whether the thing is to happen before or after the estate is to vest? if before, the condition is precedent; if afterwards, it is subsequent. *Dod d. Planner v. Scudamore*. 2 Bos. & Pull. 289.

the same by way of sale, mortgage, charge, or otherwise, ~~In~~ in the way of anticipation; and in default of such direction or appointment, into her or their own hands, for her and their own use and benefit; to the end, and so that the same may be for the sole, separate, and peculiar use and benefit of such daughter or daughters, independently and exclusively of her or their husband or husbands respectively, and may not be in anywise subject or liable to his or their debts, control, interference, or engagements; and after the decease of every or any such daughter, do and shall pay, transfer, and assign the portion or portions, the interest, dividends, and annual produce of which are hereinbefore declared to be for her separate use as aforesaid, to all and every the children and to her issue child of her body, who, being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age, or marry, to be divided between or amongst them, if more than one, in equal shares; and if but one, the whole to that one child, and the interest, dividends, and annual produce of the expectant share of each such child to be, during its suspense of vesting, applied for his or her maintenance; and if any one or more such daughter or daughters, so marrying without such consent as aforesaid under the age of twenty-one years, shall afterwards depart this life without issue, do and shall, after the de-

After the  
decease of  
such daughter,  
equally.

If no issue.

cease of any or every such daughter so dying, and whose issue shall so fail, stand and be possessed of, and interested in, the portion or portions hereinbefore declared to be for the separate use of the daughter so dying, and after her decease for her issue respectively as aforesaid,

then in trust for the other children and child of my body, who being a son or sons, shall attain the age of twenty-one years, or who being a daughter or daughters, shall attain that age, or marry under that age, with such consent as aforesaid, to be divided between and amongst them, in the same shares and proportions, and to be attended with the same provisions for maintenance and advancement, and to be subject to the same provisional or executory trusts in favour of any or every other daughter marrying under the age of twenty-one years, without consent as aforesaid, and the children of such daughter, as are hereinbefore expressed with respect to the portions firstly hereinbefore mentioned and provided, or as near thereto as the deaths of parties and other circumstances will admit.

That all the money be collected by trustees, they may pay certain annual sums &c. and sums for maintenance and advancement in or upon any stocks, funds, and securities, in

pursuance of the trusts and directions hereinbefore contained, my said trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall and may, by and out of the monies which shall come to their or his hands by the ways and means aforesaid [pay and satisfy the said annual sum of £ , or £ , (as the case may be) to my said wife or her assigns, and] advance and pay the said sums of money, which my said trustees are hereinbefore authorized and directed to advance and pay for the maintenance and advancement in the world of my said sons. Provided always, that in the <sup>Provision</sup> meantime, and until the said trust monies, <sup>for accumulation,</sup> stocks, funds, and securities, shall vest absolutely in some person or persons under the trusts hereinbefore declared of and concerning the same respectively, they the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, shall [but subject and without prejudice as aforesaid] receive the dividends, interest, and annual produce of the said trust monies, stocks, funds, and securities respectively, or the invested share or shares respectively, and lay out and invest the same in their or his names or name, in the purchase of or upon such stocks, funds, and securities as aforesaid, to be from time to time altered and varied at their or his discretion; and do and shall receive the inter-

est, dividends, and annual produce of the said last mentioned trust monies, stocks, funds, and securities, and lay out and invest the same in their or his names or name, in the purchase of or upon the like stocks, funds, and securities, so that the same, and the resulting income and produce thereof, may, during such suspense as aforesaid, accumulate in the way of compound interest; and that the said interest, dividends, and annual produce of the said stocks, funds, and securities, and the accumulations thereof respectively, shall belong to, and be in trust for the person or persons who under the trusts hereinbefore or hereinafter declared, shall become absolutely entitled to the funds from which such accumulations shall have respectively proceeded.

[See note "*Accumulation.*"]

Direction as to vesting of shares with survivorship and accrue. LXXIII. Provided always, and I do hereby declare, that the said trust monies, stocks, funds, and securities, accumulations, dividends, interest and produce thereof shall be vested in such of my children respectively, as shall be a son or sons, when and as he and they shall attain his or their age or respective ages of twenty-one years, and in such of the same children respectively, as shall be a daughter or daughters, when and as she and they respectively shall attain her or their age or respective ages of twenty-one years, or day or re-

spective days of marriage to be solemnized with the consent in writing of her or their guardian or guardians for the time being, and to be payable and paid as soon after the respective ages or days shall be attained as conveniently may be. And I do hereby further direct, that in case any one or more of my said children, being a son or sons, shall die under the age of twenty-one years without issue, or being a daughter or daughters shall depart this life under the age of twenty-one years, and also without leaving issue, and also without having been married under the age of twenty-one years with such consent as aforesaid, then the said trustees or trustee for the time being, do and shall pay, assign, and transfer the original share or shares of the said trust monies, stocks, funds, and securities, which under the trusts hereinbefore contained, shall belong to the child or children respectively who shall die as aforesaid, and also that part or share, and those several and respective parts and shares of and in the same trust monies, stocks, funds, and securities, which from time to time shall belong to or be taken by the same child or children respectively so dying as aforesaid under this present provision ; and also the accumulations, if any, of the dividends, interest, and income arising from the share or shares of the child or children respectively so dying, unto the other, or if more than one

unto the others of the same children, to be equally divided between and among the same children, if more than one, share and share alike, as tenants in common and not as joint tenants, and to his, her, or their executors, administrators, or assigns, to be vested at the respective ages, days, or times hereinbefore appointed, respecting the original share or shares of the same child or children; and to be payable and paid at the time or several and respective times appointed for the payment of the said original share or shares, or as near after the death of each respective child dying as aforesaid, as conveniently may be. And in case any one or more of my said sons who shall depart this life under the age of twenty-one years, or any one or more of my said daughters who shall die under the age of twenty-one years, having been married with such consent as aforesaid, shall leave any lawful issue living at his, her, or their death as aforesaid; then I direct, that the original and also the derivative share or shares of my said son or sons, daughter or daughters so dying, and also the accumulations, if any, of the interest, dividends, and income thereof, shall be and remain, In trust for such issue of my said son, or sons, daughter, or daughters so dying as aforesaid, who shall be living at the death or respective deaths of his, her, or their parent, or respective parents; and

in such parts, shares, and proportions, that such my grandchildren may take *per stirpes* and not *per capita*, and so as the issue of each respective parent may take as tenants in common between themselves.

LXXIV. And I do hereby declare, that the Declaration said [trustees], and the survivor of them, and that trustees shall stand the executors, administrators, and assigns of possessed such survivor, shall stand and be possessed of, <sup>of trust</sup> monies, and interested in the same trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof; Upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoies, and declarations hereinafter expressed and declared of and concerning the same respectively; that is to say; In trust to divide all the In trust said trust monies, stocks, funds, and securities, <sup>for children</sup> of testator, in equal shares between or amongst all and <sup>in equal</sup> <sub>shares.</sub> every my present and future born children and child, who being a son or sons shall respectively attain the age of twenty-one years; or <sup>When to</sup> <sub>vest.</sub> after having respectively attained the age of twenty-one years, shall marry under the age of twenty-five years; and who, being a daughter or daughters, shall respectively attain the age of twenty-five years, or marry under that age (while under the age of twenty-one years), with the consent of her or their guardian or guardians for the time being, and the respective

shares of each and every such present and future born son in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, shall re-

The share of main and be, In trust for such son, his executors, administrators, and assigns respectively, for his and their own absolute use and benefit.

sons to be absolute ; and of daughters for their separate use. And as to the respective share of each and every such present and future born daughters as aforesaid in the trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, I do hereby declare, that the said trustees or trustee for the time being shall stand and be possessed of the same ; Upon trust, that they the said trustees or trustee for the time being do and shall, during the life of such respective daughter, pay, apply, and dispose of the interest, dividends, and annual produce of such respective shares, to such person or persons only, and for such intents and purposes only, as such respective daughter, whether covert or sole, and if married, as if she were sole und unmarried, shall, from time to time, by any writing or writings signed by her own hand, direct or appoint ; and in default of and until such direction or appointment, into the proper hands of such respective daughter, for her sole and separate use and benefit, exclusively of any husband whom she may marry, and without being in anywise subject to his debts, control, in-

terference, or engagements. And the receipt or receipts of such respective daughter, or of such person or persons as she shall from time to time direct or appoint to receive the said interest, dividends, and annual produce, or any part thereof, shall, whether she shall be covert or sole, be an effectual discharge or effectual discharges for the money therein mentioned and acknowledged to be received. And <sup>After de-</sup>  
<sup>cease of</sup>  
<sup>each daugh-</sup>  
<sup>her</sup> said share in the said trust monies, stocks,  
funds, and securities, shall remain and be, In  
trust for all and every, or such one or more <sup>In trust for</sup>  
exclusively of the others or other children or <sup>her children</sup>  
child of such respective daughters, with such <sup>according to</sup>  
provision for their respective maintenance\*,

\* The rule was long established, that the Court of Chancery As to main-  
would not allow maintenance money for an infant to be paid to tenance of  
the parent out of the interest of property coming to the child  
*aliunde*, although it was ordered by the will to be applied to  
maintenance, if the parent were of sufficient ability to maintain  
his children: upon the principle that it would amount to a gift to  
the parent of so much as should be necessary for maintenance.  
*Hughes v. Hughes*, 1 Br. C. C. 387. *Andrews v. Partington*,  
3 Br. C. C. 59. *Palsford v. Hunter*, Ib. 415. *Mundy v. Earl*  
*Howe*, 4 Br. C. C. 223. This rule is however now departed  
from, under particular circumstances, and the court looking at  
such circumstances will make such order as justice and expe-  
diency may require. *Hoste v. Pratt*, 3 Ves. 730. *Cavendish v.*  
*Mercer*, 5 Ves. 195, n. *Maberly v. Turton*, 14 Ves. 499.  
*Jervoise v. Silk*, Coop. 52. Thus, where a testator devised to an  
infant grandson at twenty-one, directing accumulation in the  
mean time, with similar limitations, in case of his death under  
twenty-one, to his sisters, and the mother of the infant married

education, and advancement, and in such shares, as such respective daughter, by any a person in low circumstances, maintenance was decreed by the court. *Cavendish v. Mercer, supra.* And where the father personally and independently of his wife, who was in possession of a considerable estate, was not in circumstances and of ability to maintain and educate his infant children, the court allowed maintenance for the children without taking into consideration the separate estate of the wife, as she, during the life of the husband, was not under a legal obligation to maintain the children. *Haley v. Bannister, 4 Mad. 275.*

Where there are two funds absolutely given by different persons for the maintenance of an infant, the funds will be applied in the manner most beneficial to them. The interest of the infant must determine which of the two funds is to be so applied. *Rawlins v. Goldfrap, 5 Ves. 440. Foljambe v. Willoughby, 2 Sim. & Stu. 165.*

Where maintenance is not directed by the will.

Although the will should not authorise the application of interest to the maintenance of infants, yet, if all the individuals entitled to the fund can be brought before the court, so as to make to each a compensation for taking part from him, an allowance for maintenance will be granted ; but if the will contains successive limitations, under which persons not in being may become entitled, it is not sufficient that all the parties then living and presumptively entitled are brought before the court, for none of the living persons may be the parties eventually entitled to the enjoyment of the property. In such a case an order for maintenance would be in effect to give to one person the property of another. *Marshall v. Holloway, 2 Swanst. 436. Errington v. Chapman, 11 Ves. 20. Errat v. Barlow, 14 Ves. 202. Lomax v. Lomax, 11 Ves. 48.* If however, in the case of legacies to children given over on their dying under twenty-one, the consent of the legatee over can be obtained, maintenance will be allowed. *Fairman v. Green, 10 Ves. 45. Lambert v. Parker, Coop. 143. Buckworth v. Buckworth, 1 Fox, 80.* Wherever the children have a common interest in a fund, the income of the fund, if necessary, may be applied to their maintenance. *Haley v. Bannister, supra.*

deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of, and attested by two or more credible witnesses, or by her last will in writing, or any codicil thereto, or any writing in the nature of, or purporting to be her will, to be by her signed and published in the presence of, and attested by two or more credible witnesses, shall from time to time direct or appoint ; and in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend,

In trust for all and every the children and child of such respective daughter, who being a son or sons shall respectively attain the age of twenty-one years, or being a daughter or daughters shall respectively attain the age of twenty-one years, or marry under that age, with the consent of her or their parent or parents, or guardian or guardians for the time being ; and to be divided between or amongst such children, if more than one, in equal shares, as tenants in common. And if there shall be but one such child, the whole to be In trust for that one or only child. And if there shall be no such child, then In trust for

In default of  
appointment.

In trust for  
all the chil-  
dren

equally.

If the child has a vested interest in the principal and interest, the court will allow what is necessary for the infant's maintenance. *Stretch v. Watkins*, 1 Mad. 253. And where the sum is small, maintenance will be allowed without a reference to the master. *Ex parte Green*, 1 Jac. & W. 253.

Power for  
daughter to  
accept in-  
terest of  
trust mo-  
ney for be-  
nefit of her  
husband  
after her  
decease.

such respective daughter, her executors, administrators, and assigns. Provided always, and I do hereby further declare, that it shall be lawful for every such respective daughter, either by deed or deeds, to be by her sealed and delivered in the presence of, and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil thereto, or any writing purporting to be, or in the nature of, her will, to be by her signed and published in the presence of, and attested by two or more credible witnesses, and either before or after her marriage, to appoint the whole or any part of the interest, dividends, and annual produce of her said respective share in the said trust monies, stocks, funds and securities, to be paid after her decease to any husband whom she may marry, and his assigns for his life.

Bequest of  
money to  
trustees,

LXXV. And I also give and bequeath unto the said [trustees], their executors, administrators and assigns, the sum of £ , of lawful money of Great Britain, Upon trust, that they the said [trustees], and the survivor of them, and the executors, administrators or assigns of such survivor, do and shall invest the said last mentioned sum of £ on government or real securities, or in the purchase of American stock, if my daughter shall by writing so desire, in their or his names or name. And

or in the pur-  
chase of  
American  
stock.

do and shall, during the life of my said daughter, pay the dividends, interest, and annual produce of the said sum of £ , and the stocks, funds, and securities on which the same shall be invested, to such person or persons, and for such intents and purposes as my said daughter , whether single or married, shall from time to time direct and appoint (but not so as to deprive herself of the benefit thereof by any mode of anticipation); and for want of such direction or appointment, into her own proper hands, for her own separate and peculiar use and benefit, independently and exclusively of any person or persons with whom she may happen to intermarry. And the receipt or receipts of my said daughter , or of such person or persons as she shall from time to time appoint to receive the said dividends, interest, and annual produce, shall, whether my said daughter shall be single or married, be good and sufficient discharges for the same. And after her decease, do and shall pay, transfer, and assign the said sum of £ , and the stocks, funds, and securities on which the same shall be invested, unto, between, or amongst all and every, or such one or more exclusively of the children or child of my said daughter , or of their or any of their issue born in her life-time: and the same to be an interest or interests vested in,

L

To pay interest to  
daughter for her se-  
parate use.

After her  
decease to  
assign prin-  
cipal to the  
children of  
daughter, or  
their issue  
born in her  
life-time, as  
she shall  
appoint.

and to be paid, assigned, and transferred to, between, or amongst such child or children, or issue, or any one or more of them, on or at such age, day, or time, or respective ages, days, or times; and if more than one, in such shares or proportions \*, with such rights or benefit

As to the execution of the power of appointment over funds for the benefit of children.

\* It should be premised, that whatever forms are imposed in the execution of a power, they must in every case be strictly complied with. *Hawkins v. Kemp*, 3 East, 410. Where none are imposed, a simple note in writing (even unattested) will be a good execution. *Saunders v. Owen*, 2 Salk. 467. It is not necessary in the execution of a power, that the deed, out of which the power arises, should be referred to; for, in a court of equity, it is enough that the intent appears, and that in the execution the estates are sufficiently described. *Probert v. Morgan*, 1 Atk. 140. But although a man may execute a power without particularly reciting or taking the least notice of it, yet it must appear that he intended to execute it, and he must do such an act as to shew that he takes notice of the thing which he had power to dispose of. *Molton v. Hutchinson*, 1 Atk. 558. *Ex parte Creswall*, 1 Atk. 559. and see *Robinson v. Hardcastle*, 2 T. R. 241. *Mannock v. Horton*, 7 Ves. 391. A power cannot be executed by general words in a will. *Langham v. Nenny*, 3 Ves. 467. *Croft v. Steele*, 4 Ves. 60. See Note, "Powers."

As to the description of the object intended to be benefited:

(1). nearest and next of kin.

Where the terms of a settlement were "nearest and next of kin" the question is, whether the property belongs to the persons who are next of kin, according to the rule and measure established by the statute of distribution, or to those who are next of kin, according to a more strict and natural sense. Mr. Justice Buller decided in *Phillips v. Garth*, 3 Br. C. C. 64, that the surviving brothers and not the nephews and nieces (representing deceased brothers and sisters) were entitled to take *per capita*, but this case has not been followed. Lord Thurlow, Chancellor, disapproved of the decision, and the case ended in a compromise, the parties dividing the property among them *per stirpes*. In *Garrick v. Lord Camden*, 14 Ves. 385, Lord Eldon declared, that he

of survivorship or accrue between or amongst them, or any of them, with such provisions for

always had great doubt as to the propriety of Mr. Justice Buller's decision, which was also judicially disapproved of in *Smith v. Campbell*, Coop. 275. *Brandon v. Brandon*, 3 Swanst. 312. And in *Smith v. Campbell*, *supra*, a gift to nearest surviving relations, was construed in favour of brothers and sisters, to the exclusion of nephews and nieces.

Where trustees were authorised to give the residue of real and personal estate among the "friends and relations of the donor, as they should see most necessity, and deem most equitable and just." It was held, that the term "friends," is synonymous with relations. *Gower v. Mainwaring*, 2 Ves. 87. In *Harding v. Glynn*, 1 Atk. 469. *Green v. Howard*, 1 Br. C. C. 31. *Rayner v. Mowbray*, 3 Br. C. C. 234. *Masters v. Cooper*, 4 Br. C. C. 207. *Doe d. Garner v. Lawson*, 3 East, 278. *Anon.* 1 P. Wms. 320. *Wright v. Atkyns*, 1 Turn. 161. *Brandon v. Brandon*, *supra*, the word "relations," in a will was construed (2).  
friends,  
to mean persons who would be entitled according to the statute of distribution. It is undoubtedly a term that sufficiently describes a class of persons, and did not necessarily mean next of kin, but every person who might be a relation. In *Hedge v. Salisbury*, Ambl. 70, the words "nearest relations," were also construed by reference to the statute of distribution, as it would otherwise be endless to find out every body that were relations; this rule of construction is founded on concurrence alone, the court being compelled to reduce words, in their natural sense indefinite, to some practical meaning. (3).  
relations,

A power to dispose "to her own family," was, on the non-execution of the power, held a trust for the next of kin. *Crucoy v. Colman*, 9 Ves. 319. In *Wright v. Atkyns*, *supra*, the Lord Chancellor observed, that whether the cases which have been decided, have been rightly decided or not, there are cases in which it has been held that remainder to my family operates as a devise to my heir at law. The court, in its anxiety to find out the meaning of the testator, has found out that what he has (4).  
family,

their or any of their maintenance, education, or advancement, upon such conditions, under such

said, has the same meaning, as if he had said nothing at all with respect to those cases, he must be a bold man, who sitting in a judicial chair would attempt to disturb them.

(5). descendants Descendants mean all who proceed from the body of the person who is the head or stock; and therefore grand children will be entitled, but a great grandchild, born after the date of the will, was excluded by the words "now living." If the word "descendants" had stood alone, it would have been equivalent to heirs, but the other words "now living in or about Seven Oaks, in Kent, or hereafter residing in any part of England," showed plainly the intent of the testator, that all the persons coming within the description, must take a share; the word "descendants," is capable of such a construction as to show who fall within the class that word describes—if I am speaking of my descendants who now are, or of my descendants at the time of my death, no person can doubt who they now are, or who they will be at the time of my death, because they must be persons descended from me. *Wright v. Atkyns*. 1 Turn. 162.

(6). children. An appointment to "children" alone, will include children by any marriage. It has been long settled that an appointment cannot be made to a deceased child, or to the representatives of a deceased child. *Maddison v. Andrew*, 1 Ves. 57. But no case will, under a power to appoint to children, warrant an appointment to grandchildren; the appointment, however, is void for the excess only, and what is ill appointed goes as in default of appointment. *Bristow v. Ward*, 2 Ves. Jun. 336. *Crompe v. Barrow*, 4 Ves. 681. But see *Doe d. Duke of Devonshire v. Lord Cavendish*, 4 T. R. 741 (n), where a power to appoint to children was held to extend to grandchildren, because it appeared to be the intention of the person creating the power, and as all the objects of the appointment were in existence when the power was created.

Execution Where a devisee has power to appoint to his children, and of power in one of them dies in his life-time, the power may still be exe-

restrictions, and generally in such manner for their<sup>or</sup> any of their benefit, as my said daugh-

cuted. In the case of *Boyle v. The Bishop of Peterborough*, case of a de-  
3 Br. C. C. 242, there was only one surviving child, and therefore no power of selection or distribution remained; yet the capacity of appointment was held to continue, and to be material, because by it the donee showed her intention to exercise the power. The inconvenience of supposing that the power is gone by the death of one child above twenty-one, is very considerable, amounting to this, that the power shall by no means be executed after that event; the inevitable consequence of which is, that the power can be executed by deed only, not by will; without the particular clause for vesting the shares, the fund could not vest whilst the power remained; the question then is, as to the effect of the clause. It is not intended to bind down the property, but appears only to be intended to vest the property in case there was no appointment. The mode of executing the power in the case of a deceased child, according to the old practice of conveyancers, that prevailed before the case of *Boyle v. The Bishop of Peterborough*, was, by giving part to the surviving children, making no appointment of the residue, which therefore was permitted to go as in default of appointment. That certainly was very ill conceived and incorrect; the consequence was, that, as in most cases, the share unappointed would go among all who attained twenty-one, living and dead, as property vested in them at that age, or on marriage of daughters, it would be divisible among a child surviving and all those who were dead; but it is very difficult, almost impossible, to speak of that sort of device as an appointment. Lord Thurlow dissented from that which I understand to have been the previous notion of conveyancers, and established the rule in that case of *Boyle v. The Bishop of Peterborough*: and Lord Loughborough also appears in *Reade v. Reade* to have disturbed that doctrine; giving the fourth, which, according to the old course, would have been divided among the four, to the representatives of the deceased child. I do not perfectly understand that case, which is quite novel in this respect; but if the doctrine resulting from it, is not agreeable to what was previously understood to be the law as to the fund unappointed, as to the appointed shares it follows,

ter , by any deed or deeds, instrument or instruments in writing, to be by her

*Boyle v. The Bishop of Peterborough*; which it is better to abide by, leaving the inconvenience that may arise from it to be met by care, than to exchange it for the old inconvenience, nearly as considerable, and not got rid of by any doctrine resting upon sound principle. *Butcher v. Butcher*, 1 Ves. & Bea. 79.

posthumous A power to charge lands for portions for children living at ~~children, &c.~~ the father's death, will authorize an appointment to a child, *in ventre sa mere*. *Beale v. Beale*, 1 P. Wms. 244. *Trower v. Butts*, 1 Sim. & Stu. 181. *Ford v. Raulins*, Ib. 328. And where a testator devised to his wife, remainder to her children subject to her appointment, a child born after making the will in the testator's life-time is an object of the appointment. *Morgan d. Surman v. Surman*, 1 Taunt. 289. An interest under a power may be given to a married woman for life, and the giving it to her separate use, is so far from being an objection, that it is more strictly carrying into execution the will of the donor, and is a stronger execution of the power agreeably to his intent. *Alexander v. Alexander*, 2 Ves. 640.

Exclusive appointments.

An exclusive appointment to one object has been good in the following instances: where a power has been given to appoint "to such child and children," &c. *Swift d. Huntley v. Gregson*, 1 T. R. 432, or "to and amongst such of the testator's relations, as shall be living at the time of his death, in such parts, shares, and proportions," &c. *Spring d. Titcher v. Biles*, 1 T. R. 435, n. "for the use of such of the children, child, and issue of the body, &c. and in such shares," &c. and it was also said, that the words "such shares," &c. did not require that some part should be appointed to each child, *Doe d. Wilmett v. Alchin*, 2 Barn & Ald. 122, "to and among all such child or children, and in such part, shares, and proportions, as one should by deed or will appoint." *Wollen v. Tanner*, 5 Ves. 218.

As to the distribution of the fund.

Illusory ap- pointments.

A long series of authorities having established, that an illusory appointment is bad, the duty is imposed upon the Court, however difficult in each case, to determine, whether an appointment is or is not illusory. If a discretionary power be given to a person, to apportion a certain fund among certain objects, without

sealed and delivered, or by her last will and testament in writing, or any codicil or codicils

any particular restriction annexed, it is necessary that the whole of the fund should be distributed among the objects, every one must have some such share as that person pleases, provided the same be not illusory. No appointment is held illusory in a Court of Law, however small the share which is allotted. *Vanderzee v. Aclom*, 4 Ves. 785. *Morgan d. Surman v. Surman*, 1 Taunt. 282. But Lord Eldon has declared in direct terms, that the Court of Chancery ought never to discuss whether an appointment good at law is bad in equity as being illusory. *Butcher v. Butcher, supra*. When it is found that Sir William Grant has said, he did not know what is an illusory appointment; when it is said a *bona fide* substantial share shall be given to each object; when it has been held that £100 is such *bona fide* substantial share of £1,200; when judges, such as Lord Alvanley, have pronounced that £10 is nothing, declining to say, whether £50 out of £1,900, would be a substantial share; it will be apparent (to adopt the expression of Lord Eldon), that the rule of Court places a judge in extreme distress, who is called on to determine whether an appointment is or is not illusory. It was observed by Sir William Grant, that he would relieve himself from the difficulty belonging to such a case by taking the rule thus: if you can shew a case where the sum appointed bears the same proportion to the whole sum which is the subject of the power, as any other sum which has been actually decided to be illusory, with reference to the whole sum, the subject of the power in the case so decided, he will adopt that rule of proportion: that as the share appointed in each case does or does not bear the like proportion as in the decided case, it is, or is not, illusory. Adverting to the case of *Bax v. Whitbread*, 16 Ves. 8, Lord Eldon intimated a strong wish that he could adopt that principle in practice; but it appeared to his Lordship, that where a power of appointment was given in terms importing the most unfettered authority, (for instance, among children or other objects, in such shares and proportions as the person executing the power shall think fit), this Court had, in a course of authority governing its decisions

thereto, to be by her signed and published in the presence of, and attested by two or more

for ages, taken upon itself to say, (whether at first upon a sound principle, or misled by some misapprehension, that however large the terms, the execution must be governed by a sound discretion) : that it is a power in some degree coupled with a trust ; which if not executed *bona fide*, and according to the *arbitrium boni viri*, the execution would be good for nothing. His Lordship said, that after having given to the subject the most deliberate attention, he found it in such a state of contradiction, both from dicta and decisions of great Judges, that if he had to advise, he could not say how such a power can be safely exercised.

An interest for life in a particular share may be given to any one, and the capital of the same share may be limited to another, or the appointor may go so far as to limit it to a third child upon a contingency, provided the whole is doled out in this various way among all the objects. *Alexander v. Alexander*, 2 Ves. 640. A power was created for one to appoint to "all and every the child and children in such shares as he should think proper." He appointed to two of the children one acre for their lives, and then to fall into the residue, all of which, consisting of the remainder of the settled estate, he appointed to his second son ; the appointment was considered illusory. *Poelington v. Bayne*, 1 Bro. Ch. Ca. 450. The appointment of a fund nearly £1,900 among three children, of which £10 was given to one child, and £50 to another (they having provisions elsewhere), and the remainder to the third object, was decreed illusory. *Kemp v. Kemp*, 5 Ves. 849. In *Butcher v. Butcher*, 9 Ves. 382, the very unequal proportion of £200 stock (about the 122d part) was held not to be illusory, and the appointment of £2,400 to one object, and of £100 stock to the other, being the remainder of the fund, was deemed not to be illusory, in *Bax v. Whitbread*, 10 Ves. 31 ; the party having taken by the instruments creating and executing the power a valuable interest beyond that.

The result of the authorities on the subject is, that unless the share appears upon the mention of it not to be a substantial

credible witnesses, shall, whether single or married, direct or appoint; and in default of such direction or appointment, In trust In default of for all and every the children of my said daughter , who, being a son or sons, shall attain the age of twenty-one years, or equally. being a daughter or daughters, shall attain that age, or marry, to be divided between or amongst them, if more than one, in equal shares and proportions; and if there shall be but one such child, then the whole to be in trust for that one child; and if my said daughter shall have no child or issue who, under the trusts aforesaid, shall become entitled to the said sum of £ , and the stocks, funds, and securities on which the same shall be invested, do and shall pay, transfer, one moiety and assign one moiety or equal half part of the same, and the dividends, interest, and annual produce thereof, unto such person or persons as my said daughter , by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by

part or share of the subject of the power, the Court never does call on the person executing it to say, why he has not given it in equal shares among the objects. *Butcher v. Butcher, supra.* In that and the following cases, the whole subject is exhausted, all the contradictions both of dicta and decisions are noticed. *Pocklington v. Bayne*, 1 Bro. Ch. Ca. 450. *Bristow v. Warde*, 2 Ves. Jun. 336. *Vanderzeel v. Aclom*, 4 Ves. 771. *Kemp v. Kemp*, 5 Ves. 849. *Mocatta v. Lonsada*, 12 Ves. 123. *Dyke v. Silvester*, 12 Ves. 126. *Bax v. Whitbread, supra.*

her signed, sealed, and delivered in the presence of, and to be attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereto, to be by her signed and published in the presence of, and to be attested by the like number of witnesses, shall direct or appoint;

In default of appointment, to her next of kin, as if she had died unmarried.

entitled thereto as her next of kin, under the statutes made for the distribution of the estates of intestates, in case the said \_\_\_\_\_ had died possessed of the same, and unmarried. And if there shall be more than one person answering that description, then the same shall be divided between or amongst them, in the shares in which, by virtue of the said statutes, the same would on that event be divisible between or among them. And do and shall stand and be possessed of the said moiety of the said sum of £ \_\_\_\_\_ and the stocks, funds, and securities

The other moiety to accumulate.

on which the same shall be invested; In trust to accumulate the same, and the interest thereof during the period of twenty years, to be computed from my decease, or so much of that period as shall be to come at the time of the decease of the said \_\_\_\_\_, and such failure of issue of her body as aforesaid. And do stand and be possessed of the said moiety, and the accumulations of the same, on the trusts

hereinafter expressed and contained of and concerning the ultimate surplus or residue of the accumulations hereinafter directed to be made. Provided always, and I declare my will Appointed share of each child to be brought into hotchpot.

and mind to be, that no child of the said taking any share of the said sum of £ under an appointment to be made in his or her favour by the said shall be entitled to any share of the unappropriated part of the same, without bringing his or her appointed share into hotchpot, and accounting for the same accordingly. And that after the decease of the Provision said the said [trustees], and the survivor for maintenance, education, and assigns of such survivor, shall and may, at advance-wards the maintenance and education of any of her children, whose portion, under the trusts aforesaid, shall not then be vested, all or any part of the interest, dividends, and annual produce of such his, her, or their then presumptive portion. And also that it shall be lawful for them the said [trustees], and the survivor of them, and the executors and administrators of such survivor, after the decease of the said , or with her consent in writing during her life, to advance for or towards the preferment or advancement, or in any other manner for the benefit of any child of the said , all or any part of his, her, or their then presumptive portion, under the trusts aforesaid.

Monthly  
sum to be  
paid to  
married  
daughter.

LXXVI. And I direct the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of the survivor of them, to lay out and invest in his or her name or names, such sum of money in the purchase of a share or shares of the public stocks, or funds of Great Britain, or at interest upon any securities in England and Wales, the interest, dividends, or annual produce whereof will produce a monthly sum of £ , and monthly, on the first Monday in every month, to pay the same to my daughter , the wife of , for and during the term of her natural life, for her support and maintenance, so, and in such manner, that she may receive the same for her sole use, separate and apart from and independently of her husband, the said . And so and in such manner, that she may not anticipate, charge, assign, or encumber the growing payments thereof, and so and in such manner, that the said monthly sums may not be subject to the claims of any person or persons, to whom or in whose favour my said daughter, or her said husband, shall attempt to sell, charge, or encumber the same, or of any person or persons to whom my said daughter or her said husband may become indebted, and so that the same may not be liable to the claims of creditors under a commission of bankrupt, or under any act for the relief of insolvent debtors.

And I direct that the receipts of my said daughter alone, notwithstanding her coverture, shall be sufficient discharges for the same monthly sum; and that the first payment thereof shall be made on the first Monday of the first month next after my decease. And that subject to the said monthly payment, the stocks, funds, and securities to be appropriated as a fund for the payment of the same sum, shall be deemed as part of the residue of my personal estate, and be subject to all the trusts hereinafter expressed and declared concerning the same.

LXXVII. And I give to the said [*trustees*], Bequest of their executors, administrators, and assigns, <sup>money to</sup> <sub>*trustees*,</sub> the sum of £ , to be raised and appropriated by them immediately after my decease, and to be applied in manner hereinafter mentioned; that is to say; Upon trust, that they to be invested on securities, the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, immediately after my decease, lay out and invest the same in their or his names or name, in the purchase of parliamentary stocks, or public funds of Great Britain, or at interest on government or real securities, in England. And do and shall, from time to time, alter and vary the same at their or his discretion, for or into other stocks, funds, or securities of the like

Interest and nature. And do and shall pay the interest, trust monies for separate use of daughter. dividends, and annual produce of the said trust monies, and the stocks, funds, and securities in which the same shall be laid out and invested, to such persons, and for such intents and purposes, as my daughter shall, as and when the same interest, dividends, and annual produce shall become payable, and not in any mode of anticipation, direct or appoint; and for want of such direction or appointment, into her own hands, for her own sole, separate, and peculiar use and benefit, and without being in anywise subject or liable to the debts, control, or interference of any husband with whom she may intermarry\*; and her receipts, whether she shall

Trusts for  
*feme covert*  
as to per-  
sonality.

\* In order to defeat the marital right of the husband, the intention of the testator to that effect must be unequivocally declared, otherwise a gift to the wife is, both at law and in equity, a gift to the husband, who being bound to maintain the wife is entitled to her property.

The Courts have gone a great way in abridging the marital rights of the husband. Money directed *to be paid into her proper hands*, has been held to pass a separate estate. *Hartley v. Hurle*, 5 Ves. 545. A bequest of the yearly dividends of stock to a married woman during her life, accompanied with a direction, that the trustee should not be compelled to see to the application of the money, but that *her receipt in writing should be a sufficient discharge to the trustee*, was considered as giving an absolute power to the wife (independently of the husband) to receive the money, and that the wife had a separate interest. *Lee v. Prieaux*, 3 Bro. Ch. Ca. 381. A trust for the *sole use, benefit, and disposition* of the wife excludes the husband. Taking the words "*sole use*" by themselves, they must have the same meaning as

be single or married, shall be good and effectual releases and discharges for the same.

separate use ; " sole " means solely hers—for her sole benefit. It is an emphatic and operative word. *Ex parte Wray*, 1 Madd. 199. In *Adamson v. Armitage*, Coop. 283, the words *for her own sole use and benefit* were held to pass a separate estate—A bequest to *her own use independent of her husband*, was held to be a separate estate. *Wagstaff v. Smith*, 9 Ves. 523. *Parkes v. White*, 11 Ves. 209. A legacy to a married woman *for her own use and at her own disposal*, entitles her to receive the legacy for her sole and separate use *independent of her husband*. *Prichard v. Agnes*, 1 Turn. 222. Where property is certainly given to the separate use of the wife without the intervention of trustees, the Court, in compliance with such declared intention will supply the want of them, and make the husband trustee. *Bennett v. Davis*, 2 P. Wms. 316. *Lee v. Prieaux, supra*. *Rich v. Cockell*, 9 Ves. 369. *Parker v. Brooke*, 9 Ves. 583. And where personal estate is thus clearly and manifestly given to the separate use of a *feme covert*, she is considered with respect to it as a *feme sole*, and may dispose of the same ; for all the cases shew, that where personal property can be enjoyed separately, it must be so with all its incidents, and the *jus disponendi* is one of them. *Fettiplace v. Gorges*, 3 Bro. Ch. Ca. 7. Though in the notion of law, a wife cannot make a will, yet where a *feme covert* has a separate power over her estate, and may dispose of it by will ; whatever sort of writing she leaves, it ought first to be propounded as a will in the Spiritual Court. And where no executor is appointed, that Court will grant administration to the husband with the paper annexed. *Ross v. Ewer*, 3 Atk. 155. If the power is to be executed by will attested, there must, in order to prove a due execution of the power, be the judgment of the Ecclesiastical Court, that the instrument is testamentary, and also proof in the Court of Chancery by the witnesses. *Rich v. Cockell, supra*. Moreover, the wife having a power to dispose of the principal, she has necessarily the like power over its produce, for the sprout is to savour of the root, and to go the same way. She has therefore a general power to dispose of the savings arising from her separate property. *Gore v.*

After her  
decease,

**And after the decease of my said daughter  
the said [trustees], their executors, administra-**

**Knight**, 2 Vern. 535. Where property is given to the sole and separate use of a *feme covert*, and is directed to be paid into her own proper hands, and upon her receipt alone, such direction is considered as being intended only to exclude the marital claims of any present, or after taken husband, and not to control that right of disposition which is incident to property.

**Action v. White**, 1 Sim. & Stu. 429.

How the se-  
parate pro-  
perty of a  
*feme covert*  
may be  
charged.

In the case of *Greatley v. Noble*, 3 Madd. 79, the question as to the liability of a *feme covert's* estate to answer general demands upon her was ably argued; but it was not necessary to determine the general point, as the demurrer to the bill against Lady Pomfret was overruled, and the bill was ordered to be answered. The Vice Chancellor, Sir John Leach, however, made the following remarks: "at law there can be no separate enjoyment of property by a *feme covert*; in equity there may, and as incident to the power of enjoyment she has a power of charging her separate property; where a wife, as in *Hulme v. Tenant*, (1 Bro. Ch. Ca. 20), and other cases, joins with her husband in a security, it is implied to be an execution of her power to charge her separate property. If it were necessary now to decide the point, I think it would be difficult to find either principle or authority for reaching the separate estate of a *feme covert*, as if she were a *feme sole*, without any charge on her part, either express or to be implied." And in a subsequent case of *Stuart v. Viscount Kirkwall*, 3 Madd. 387, his Honour adverting to the last cited case said, that he had then occasion to consider this doctrine, and he then was, and continued to be of the same opinion, that a *feme covert* being incapable of contract, the Court could not subject her separate property to general demands; but that as incident to the power of enjoyment of separate property, she has a power to appoint it; and that the Court will consider a security executed by her, as an appointment *pro tanto* of her separate estate.

There is no case in which the broad rule, that a married woman is to be considered as a *feme sole*, as to property to her separate use, has been impeached. There are many cases in

tors, and assigns, shall stand and be possessed of, and interested in the said sum of £

which the question has been, whether the absolute property, including a power of disposition, was intended to be given, or whether it was a personal gift only, without a power of disposition. When the Court has seen from the words an intention to limit a married woman to a personal gift, without giving to her a power of disposition, it has said, that condition might be imposed; and an interest inconsistent with it should not be effectual.

*Wagstaff v. Smith, supra. Hulme v. Tenant, 1 Bro. Ch. Ca. 20. Jones v. Harris, 9 Ves. 497. Wilts v. Dawkins, 12 Ves. 503.*

*Lee v. Muggeridge, 1 Ves. & Bea. 118.*

If the produce of stock be given, it carries the principal, unless there are words used to confine it to a life interest. And though stock carries the principal. subsequent words, giving a power of appointment, be added, they are to be considered merely as an anxious expression of the intention that the legatee shall have an uncontrollable power of disposing of the fund. Nor does it make any difference, though the income be given to the legatee directly, or through the intervention of trustees. *Elton v. Shephard, 1 Bro. Ch. Ca. 532. Phillips v. Chamberlaine, 4 Ves. 51. Stretch v. Watkins, 1 Madd. 253, 2 Madd. 188. Fairman v. Green, 10 Ves. 48. Page v. Leapingwell, 18 Ves. 417. Haig v. Swiney, 1 Sim. & Stu. 487.*

In *Brandon v. Robinson, 18 Ves. 429*, Lord Eldon said, that Necessity of the old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands, and upon her own receipt only; yet the Court always said, she might dispose of that interest, and her assignee would take it; as, if there was a contract entitling the assignee, this Court would compel her to give her own receipt, if that was necessary, to enable him to receive it. It was not before Miss Watson's case that these words, "not to be paid by anticipation," &c. were introduced. I believe these were Lord Thurlow's own words, with whom I had much conversation upon it. He did not attempt to take away any power the law gave her, as incident to property, which, being a creature of equity, she could not have at law. But as under the words of the settlement, it would have been hers absolutely, so

and the stocks, funds, and securities on which the same shall be laid out and invested, and

that she could alien. Lord Thurlow endeavoured to prevent that, by imposing upon the trustees the necessity of payment to her, from time to time, and not by anticipation—reasoning thus, that equity, making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it; but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different. *Et vide Parker v. White*, 11 Ves. 221. *Jackson v. Hobhouse*, 3 Meriv. 437.

When, therefore, it is intended to give to a married woman a fund which she shall not have power to alienate, it is proper to create a trust for that purpose. And when it is intended that the wife shall not dispose of the annual interest to be paid to her, it is proper expressly to direct, that she shall not sell, alien, mortgage, charge, or otherwise dispose of the same in the way of anticipation.

As to the examination in court of a married woman.

In all cases where a *feme covert* has absolute power over her separate property, no examination in Court is necessary. *Sturgis v. Corp*, 13 Ves. 192. She cannot, by such examination, exercise any greater or other power over her settled property than is reserved to her, and therefore the Court cannot by her consent, upon examination, transfer to her husband personal property, settled in trust for her, absolutely, on surviving her husband. *Richards v. Chambers*, 10 Ves. 580. Where a married woman was ready to give her consent in Court, that the trustees of her fortune should pay to the husband the money which had been settled, upon her marriage, for her separate use, and after her decease to such persons as she should by will appoint, and in default of appointment, to her executors or administrators—the Court refused the application, as the wife could only dispose of the money by will. *Socket and wife v. Wray and another*, 2 Atk. 67 (n). The examination in Court before mentioned, of a *feme covert*, with respect to personal estate, is by way of analogy to the passing a fine of real estate, and if she consent that her fortune, settled in trust upon her, shall be paid over to her husband, or settled in a certain manner, she will be bound by such consent and agreement, when there is sufficient

the interest, dividends, and annual produce thereof; In trust, for all and every, or such one or more exclusively of the other or others of the child or children of my said daughter , or of her remoter issue born in her life-time. And the same shall be an interest or interests vested in, and be paid, transferred, or assigned to him, her, or them, on or at such age, day, or time, (not happening after twenty-one years, to be computed from the decease of my said daughter ) and if there shall be more than one object of this present power, the same shall be divided between or among them, or any of them, in such shares, and be charged with such annual sum or sums of money, and limitations over, to, or in favour of, or between them or any of them, and attended with such provisions for their or any of their maintenance or advancement, and subject to such restrictions, under such conditions, and generally in such manner, for their or any of their benefit, as my said daughter , by any deed or deeds, instrument or instruments in writing, with or without power of revocation or new appointment, to be by her sealed and delivered in the presence of, and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils to

In trust for  
children, as  
she may  
appoint.

ground for the Court to make an order thereon. *Willats v. Cay.*  
2 Atk. 67 : but see *Richards v. Chambers, supra.*

the same, to be by her signed and published in the presence of, and attested by the like number of ~~witnesses~~, shall, whether single or married, direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment shall not extend, In trust, for all and every of the chil-

In default  
of appoint-  
ment,

for children  
equally.

dren and child of my said daughter , who, being a son or sons, shall attain the age of twenty-one years, or who being a daughter or daughters, shall attain that age, or marry with her consent in her life-time, or afterwards with the consent of their respective guardian or guardians for the time being; and the same shall be divided between or among the said children, if more than one, in equal shares; and if there shall be but one such child, the whole shall be in trust for that one child, his or her executors, administrators, or assigns.

In default of  
children of  
daughter,

And if there shall be no such child, the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, shall stand and be possessed of, and interested in, the said sum of £ , and the stocks, funds, and securities on which the same shall be laid out and invested, and the interest,

In trust for  
such of the  
children or  
remoter is-  
sue of the  
other chil-  
dren of tes-

dividends, and annual produce thereof, In trust for all and every, or such one or more, exclusively, of the other or others of the children or remoter issue of any of my other children; and the same shall be an interest or interests vested

in, and paid, transferred, or assigned to them, tator, as  
or any of them, on or at such age, day, or time, <sup>daughter</sup>  
or respective ages, days, or times (not hap- <sup>may ap-</sup>  
point.

pening after twenty-one years, to be computed  
from the decease of my said daughter ),  
and shall be divided between or among them,  
or any of them, in such shares, and charged  
with such annual sums of money, to be paid  
to them or any of them, and with such limita-  
tions between or among them, or any of them,  
and generally, in such manner for their or any  
of their benefit, as my said daughter , by  
any deed or deeds, instrument or instruments  
in writing, so to be by her sealed and deliv-  
ered, or by her last will and testament in  
writing, so to be by her signed and published as  
last hereinbefore is mentioned, shall from time  
to time direct or appoint; and in default of In default  
such directions or appointments, and so far as of appoint-  
the same shall not extend, they the said [trus- ment, trus-  
tees to lay  
tees], and the survivor of them, and the exe- out the trust  
cutors, administrators, and assigns of such sur- monies in  
vivor, shall call in or convert the ~~said~~ sum of purchase of  
£ , and the stocks, funds, and securi- lands.  
ties in which the same shall be laid out and in-  
vested, into money, and lay out and invest the  
money arising thereby in the purchase of free-  
hold or copyhold lands of inheritance, or of  
any leasehold messuages, lands, tenements, and  
hereditaments convenient to be held with the  
lands hereby devised, or so to be purchased;

How to be  
settled.

and shall settle and assure, or cause to be settled and assured, the messuages, lands, tenements, and hereditaments so to be purchased, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoies, and declarations hereinafter expressed and contained of or concerning the estates first hereinafter mentioned and devised, or such of them as shall then be subsisting undetermined or capable of taking effect;

Until purchases made to pay interest,

and until a proper purchase for the same ~~trust~~ monies be found, do and shall pay the interest, dividends, and annual produce of the said sum of £ , and the stocks, funds, and securities on which the same shall be laid out and invested, to the persons or person who would be entitled to the rents, issues, and profits of the estates to be purchased with the same, in case such estates were actually purchased and settled in the manner hereinbefore directed.

to persons  
who would  
be entitled  
to the rents  
of the  
estates.

Proviso to  
prevent  
vesting of  
leaseholds  
in tenant in  
tail.

Provided always, that if any of the said messuages, lands, tenements, and hereditaments so to be purchased, shall be held by any lease or leases for years, the same shall not, for the sake or purpose of transmission, vest absolutely in any person son hereby directed to be made tenant in tail male by such purchase of the same messuages, lands, tenements, and hereditaments, unless or until he shall attain the age of twenty-one years. But such tenant in tail male, shall ne-

vertheless, during his minority, be entitled to the rents, issues, and profits thereof. Pro-Appointed vided always, and I do hereby declare my will shares of children to to be, that no child of my said daughter , be brought taking any part of the said sum of £ , or pot. the stocks, funds, and securities on which the same shall be laid out and invested, under any exercise of the power of appointment hereby given to her over the same, shall be entitled to any purchases or other share of or in the same, without bringing his or her appointed share into hotchpot, and accounting for the same accordingly. Provided also, that after the decease of my said daughter , the said [trustees], and the survivor of them, and the executors and administrators of such survivor, shall and may apply for or towards the maintenance and education of any child of my said daughter , whose portions, under the trusts aforesaid, shall not be vested and payable at the time of her decease, any part of the interest, dividends, and annual produce of his, her, or their presumptive portion, under the trusts aforesaid; and that after the decease of my said daughter , or in her life-time, if she shall so direct by any writing under her hand, it shall be lawful for the said [trustees], and the survivor of them, and the executors and administrators of such survivor, to apply for or towards the advancement or preferment in Provision for maintenance, education, and advancement of children.

the world, or in any other manner, for the benefit of any of her children or remoter issue, or into the proper hands of any such child or remoter issue, all or any part of his or her then vested or then presumptive share, under the trusts aforesaid. And I declare the bequests contained in this my will to or in favour of my said daughter , are not to be considered in lieu of, or in satisfaction for, but that the same are to be in addition to certain consolidated Bank annuities and sums of money which I settled upon her at the time of her marriage, in the names of A. B. and C. D. as trustees. And I hereby confirm the settlement of the same in every respect. [See Note, “*Legacies*” (8)].

*Bequest to daughter to be in addition to other provision made for her on her marriage.*

*Confirmation of her marriage settlement.*

*In trust for children of testator's sister.*

LXXVIII. In trust, for all and every the children and child of my sister , now born or hereafter to be born during the life of my said sister, who being a son or sons (and not being her eldest or only son for the time being), shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age, or marry with the consent of her or their parent or parents, guardian or guardians, and to be divided between or amongst them, if more than one, in equal shares and proportions. And if there shall be but one such younger child, then the whole to be in trust for that one child. Provided always, and I

do hereby declare my will and mind to be, that Provision  
 they the said [*trustees*], and the survivor of for mainte-  
 them, and the executors and administrators of nance, edu-  
 such survivor, shall and may, during the sus- cation, and  
 pence of vesting of the said sum of £ advance-  
 , and the stocks, funds, and securities on which  
 the same shall be invested, at their or his  
 discretion, pay and apply for or towards the  
 maintenance and education of any child of the  
 said , whose portion under the trusts  
 aforesaid shall not then be vested, all or any  
 part of the interest, dividends, and annual pro-  
 duce of such his or her then presumptive por-  
 tion; and also that it shall and may be lawful  
 to and for the said [*trustees*], and the survivor  
 of them, and the executors and administrators  
 of such survivor, to advance for, or towards  
 the preferment or advancement, or in any  
 other manner, for the benefit of any child of  
 the said , all or any part of his or her  
 then presumptive portion. And I do hereby Direction as  
 further direct, that they the said [*trustees*], and to accumu-  
 lation of in-  
 the survivor of them, and the executors and terest.  
 administrators of such survivor, do and shall,  
 until the vesting of the said trust monies,  
 stocks, funds, and securities, receive and take  
 the interest, dividends, and annual produce of  
 the same, or the unvested or unapplied part  
 or parts thereof, under the trusts aforesaid,  
 and lay out and invest the same in their or his

names or name, in the purchase of some of the parliamentary stocks or public funds of Great Britain, or at interest, on government or real securities in England; and do and shall alter, vary, and transpose the said stocks, funds, and securities, for, into, or upon other stocks, funds and securities of a like nature, at their or his discretion; and do and shall repeat such receipts and investments, so that the said trust monies, stocks, funds, and securities, interest, dividends, and annual produce, and the resulting income thereof, may accumulate in the

To whom to belong. way of compound interest; and I do hereby further declare, that the said interest and dividends, and the accumulations thereof respectively, shall belong to, and be in trust for the person or persons who, under the trusts hereinbefore declared, shall become entitled to the fund or funds from which such accumulations shall have proceeded, and be considered

If no child of sister should be come entitled, all the trust monies contained, become entitled to the said sum of £ , and the stocks, funds, and securities upon which the same shall be invested, and the accumulations thereof, the same respectively shall sink into, and form part of, the residuum of my personal estate.

will, as one of my four younger children, be entitled at my decease to the sum of £ , for her fourth part and share of the sum of £ , settled on my younger children by my marriage settlement; now, therefore, as well in discharge of the said debt, as also for a further provision for my said daughter, I give to her, the said , the sum of £ to be paid to her within six calendar months after my decease, with lawful interest from the time of my decease. [See note " *Legacies*," (8)].

LXXX. I give the sum of £ to the said *trustees*, their executors, administrators, and assigns, In trust, to pay and apply the same to such person or persons, and for such purposes, as A. B., my daughter, shall, whether single or married, direct by any note or writing under her hand; and for want of such direction, to her own separate and peculiar use and benefit, independently and exclusively of her present or any future husband, and without being in any wise subject or liable to his debts, control, interference, or engagements; and her receipts, notwithstanding her coverture, to be effectual releases and discharges for the same. And my will is, that the same shall be in addition to the portion or provision I have otherwise made for her.

**Bequest of reversionary interest under a will.** **LXXXI.** And whereas by the will of my friend E. F., I am entitled to one-third part of his estate and effects after the death of A. B. and C. D\*. Now I do hereby bequeath the

**Bequest of possibilities of personal estate.**

\* There are many determinations in the Court of Chancery, which prove that at this day possibilities of personal estate are devisable. (Fearne's Cont. Rem. 549). A man may devise things personal which he has not; for the legacy passes not by the will, but by the assent of the executor, to whom the will is only directory; and whatever may come to my executor, I may dispose of by my will, as a right of a term or a thing in action when recovered, for the executor has his authority only to fulfil the will. (Treatise of Equity, 1st vol. p. 220). The reason why personal estate will so pass was stated by the Court, in the case of *Wind v. Jekyll*, 1 P. Wms. 572, to be, that "with regard to the real estate bought after the making the will, supposing that not to pass, still there is in law one capable of taking it, viz. the heir; but as to personal estate, if the executor, though appointed before the acquiring thereof, does not take it, it is uncertain who shall." Where a testator possessed of a term, devised it, after his wife's death, to his son, and made his wife executrix, who proved the will, and consented to the legacy; afterwards the son died in the life-time of the mother, having devised the lands comprised in the said term; the Court held, that the devisee of the son should enjoy under his will, against the representatives of the mother. And again, where a term of years was devised to B. for life, with remainder to C., who in the life-time of B. devised his remainder to another person, such devise was held to be good, and that it amounted to the same thing as if C. had declared by his will that his executor should stand possessed of the term, in trust for the devisee; and it was decreed, that the administrator *de bonis non* of C. should assign over the term. *Wind v. Jekyl, supra.* It may not be improper also to observe, that such possibilities of personal estate are assignable in equity. This doctrine is exemplified in the following cases, cited in Fearne's Cont. Rem. p. 549. A testator possessed of a term for 1,000 years, devised it to B. for

Such interests may be assigned.

said third part of the said estate and effects of to younger sons, and to the said E. F. to my second and youngest sons, daughters, and , and to my two daughters, in equal shares. and , and to their respective executors, administrators, and assigns; to be divided between or among my said two younger sons and my said two daughters, in equal shares; and the shares of my said two daughters, if they should be married at the time of my decease, to be for to be for their separate use, benefit, and disposal, independently of their respective husbands.

**LXXXII.** Provided always, and I do here-  
by declare, that if any daughter of the said *Jane B.*, who, if she had survived me and at-  
fifty years, if she should so long live, and after her decease to C., and died; C. assigned it to D. during the life of B. This assignment was held good. *Kimpland v. Courtney*, 2 Freem. 250.

So in another case, a testator devised his term to his wife for life, remainder to his son and daughter, and died; the daughter and her husband, in the life-time of the wife, assigned their moiety, and after the death of the brother, living the mother, they assigned the other moiety: this assignment was established in Chancery, and also by the House of Lords. *Theobalds v. Duffey*, 9 Mod. 101. *Duke of Chandos v. Talbot*, 2 P. Wms. 608. Again, where there was a devise of lands to be sold, and the money arising therefrom to be paid to such of the children of B. as should be living at her death, one of her children, in her life-time, became a bankrupt; and it was held that the assignment by the Commissioners passed the contingent share which he became entitled to upon his mother's decease, as he survived her. *Higden v. Williamson*, 3 P. Wms. 131.

tained the age of twenty-one years, or married, would have become entitled to a portion, under the trusts hereinbefore expressed of and concerning the said sum of £ , shall depart this life in my life-time, leaving issue one or more child or children living at the time of my decease, then, and in that case, such child or children shall become entitled to the portion to which his, her, or their parent would have been entitled, if she had survived me, and the same shall be divided between or among them in equal shares.

Bequest of  
money to  
trustees,

for the sepa-  
rate use of  
an unmar-  
ried female.

LXXXIII. I also give and bequeath the further sum of £ of like lawful money, to the said [trustees], their executors, administrators and assigns, Upon trust, that they the said trustees, or the survivor of them, or the executors, administrators, or assigns of such survivor, do and shall lay out and invest the same in their or his names or name, in any of the stocks, funds, and securities, hereinbefore mentioned; And do and shall, with the consent in writing of *Ann B.* spinster, (daughter of *A. B.* of &c.), during her life; and after her decease, at their or his discretion, alter and vary the said sum of £ into other stocks, funds, and securities of a like nature. And upon this further trust, that they the said trustees or trustee for the time being do and shall, during the life of the said *Ann B.*, pay the interest and

dividends of the said last mentioned sum of £ into the hands of her the said *Ann B.* or to such person or persons as she, whether covert or sole, shall, by any writing under her hand, from time to time appoint: To the intent, that the same may be for her separate use, and not subject to the debts, control, or interference of any husband whom she may marry. And the receipt or receipts of the said *Ann B.* for the said interest and dividends, or of the person or persons whom she shall appoint to receive the same, shall, whether she shall be covert or sole, be an effectual discharge or effectual discharges for the money therein mentioned and acknowledged to be received; and from and immediately after the decease of the said *Ann B.* the last mentioned sum of £, and the stocks, funds, and securities in which the same shall be invested, and the interest and dividends thereof, shall be and remain In trust, for all, every, or such one or more exclusively of the other or others of the children or child of the said *Ann B.* with such provisions for their respective maintenance, education, and advancement, and in such shares, if more than one, and with such restrictions, and in such manner, as the said *Ann B.* shall, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered, or by her last will and testament And after her decease, In trust for her children as she may appoint.

in writing, or any codicil thereto, or any writing in the nature of a will, to be by her signed and published, in the presence of and attested by two or more witnesses, from time to time

In default  
of appoint-  
ment,

In trust for  
the children  
equally.

direct or appoint; and in default of such direction or appointment, and so far as any such, if incomplete, shall not extend, In trust, for all and every the children and child of the said *Ann B.* and if more than one, in equal shares, as tenants in common; but no child taking under any appointment to be made in exercise of the aforesaid power, shall be entitled to any share of the unappointed part of the said last mentioned sum of £ , and the stocks, funds, and securities thereof, without bringing his or her appointed share into hotchpot\*, and ac-

Hotchpot.

\* This expression means "a blending or mixing together of lands given in marriage with other lands in fee, falling by descent." Litt. 268. Co. Litt. 177 b. But, there is a bringing of money into Hotchpot by virtue of the statute of distribution of intestates' effects, 22d & 23d Charles 2, c. 10, s. 5. In such cases hotchpot may be defined to be the bringing of a previously advanced share into the general mass of property, to be divided at the death of an intestate. As the provision in the statute for bringing advances by way of settlement into hotchpot, applies only to cases of actual intestacy, it becomes necessary, that a clause should be inserted in wills for bringing an advancement into hotchpot.

What is an  
advance-  
ment.

It has been determined that small sums occasionally given to a child, or presents made to him by his father, shall not be deemed an advancement; a gold watch or wedding clothes are no advancement. *Elliot v. Collier*, 3 Atk. 526. *Garon v. Trippet*, Ambl. 189. Maintenance money or an allowance to a son at the University, or in travelling, is not to be taken as any part of his

counting for the same accordingly. Provided always, and I do hereby declare, that if any

advancement, this being only for his education. Nor is the putting out a child as an apprentice an advancement; but if an office be bought for the son, though but at will, or a commission in the army, these are advancements. *Lord Kirkudbright v. Lady Kirkudbright*, 8 Ves. 51. *Norton v. Norton*, 3 P. Wms. 317 n. *Sed. vid. 1 Atk.* 402. The use of furniture for life has also been held an advancement. A provision for a child by will (for a case may happen, that as to part of the personal estate the testator may die intestate), is not an advancement to be brought into hotchpot, neither shall land given by a will to a younger child; for a provision, to be brought into hotchpot, must be such as is made by an act in the intestate's life-time and not by will. Any provision by land to the heir at law of the intestate, however given, is privileged, and is not to be brought into hotchpot. *Edwards v. Freeman*, 2 P. Wms. 435. But an advancement to the heir of personal property must be brought into hotchpot. *Lord Kirkudbright v. Lady Kirkudbright, supra*. *Pheney v. Pheney*, 2 Vern. 638. A rent out of lands for a younger child is an advancement *pro tanto*. *Ibid.* Money laid out on repairs of houses, which descended to the eldest son as heir, is not an advancement, but it would be otherwise if the houses were given to the son in the father's life-time. *Smith v. Smith*, 5 Ves. 721. If a father by deed settle an annuity on his child, to commence after his death, this is an advancement *pro tanto*; and by the same reason a reversion settled on a child, as it may be valued, is an advancement also. *Edwards v. Freeman, supra*. Portions secured for children by settlement on the marriage of the parents are to be brought into hotchpot; for at the time of making the statute of distribution, it was usual to provide for children by settlement. *Ibid.* Where a father made a provision for his son on his marriage, all the limitations in such settlement to the wife and children of such son were considered as part of that advancement; and the Court observed, that it is not the child's estate for life only that ought to be valued and brought

one or more of the children of the said *Ann B.* being a son or sons, shall die under the age of

*Clause of survivorship and accrue.* twenty-one years, or being a daughter or daughters, shall die under that age without being or having been married, then, as well the original share or shares of the child or children so dying, as the share or shares which, by virtue of this present proviso, shall

in, but the whole principal sum originally settled, for had the son died in the life-time of the father leaving children, if his advancement only was to be brought in, his children would be obliged to bring nothing into hotchpot, and yet would be entitled to an equal share with the other children of the grandfather, which would be directly contrary to the intent of the statute. *Weyland v. Weyland*, 2 Atk. 632.

Custom of London, &c.

Customs within London and the province of York, and other particular customs are exempted from the operation of the statute of distribution, sec. 4. Upon a reference to the Recorder of London by Lord Chancellor Somers, to certify what was the custom in London concerning the advancement of children by their father, which would exclude them from having shares of the personal estate of their father after their death, it was certified by the Lord Mayor and Aldermen of London, that though the advancement should not be equal to the customary share at the father's decease; yet the child so advanced shall be excluded from any further part of the customary estate, unless the father should by his last will, or some other writing signed with his name or mark, declare the value of such advancement; in which case the child advanced bringing the advancement into hotchpot, shall notwithstanding the father's declaration of having fully advanced the child, have as much more as will make the advancement a full customary share. *Chace v. Box*, 1 Eq. Ca. Abrid. "Customs of London and York," 154. 1 Lord Raym. 484. *Hume v. Edwards*, 3 Atk. 449. *Herne v. Barber*, 3 Atk. 212. Co. Litt. 176 b. and Mr. Butler's notes, 8 and 9.

have survived or accrued to him, her, or them, of and in the said last mentioned sum of £ , and the stocks, funds, and securities thereof, shall go and remain, and be to the other or others of the said children; and if more than one, in equal shares, as tenants in common.

Provided always, and I do hereby further declare, that after the decease of the said *Ann B.* and during such time as her said children, or any of them, being a son or sons, shall be under the age of twenty-one years, or being a daughter or daughters, shall be under the said age, and unmarried, the said trustees or trustee for the time being shall receive the said interest and dividends of the share to which such child shall be for the time being entitled, under the trusts and provisions hereinbefore declared and contained, and apply the same for or towards his or her maintenance, or otherwise for his or her benefit. Provided always, and I do hereby further declare, that it shall be lawful for the said trustees or trustee for the time being, during the life of the said *Ann B.* with her consent, and after her decease at their or his discretion, to raise and apply all or any part of the share of any one of her said children whose share shall not then be payable under the trusts and provisions hereinbefore declared and contained for or towards his or her preferment, advancement, or benefit: And I do hereby further declare, In default

Power for  
trustees to  
provide for  
the mainte-  
nance of  
children.  
  
And for  
their ad-  
vancement.

of issue, trust monies given to other purposes. that if there shall be no child of the said *Ann B.* or being such, the son or sons shall die under the age of twenty-one years, and the daughter or daughters shall die under the age of twenty-one years, without being or having been married, then, after the decease of the said *Ann B.* and such failure of her issue as aforesaid, the said last mentioned sum of £ , and the stocks, funds, and securities on which the same shall be invested, and the interest and dividends thereof, shall be and remain upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisoies, and declarations, as are hereinbefore expressed and declared of and concerning the said sum of £ , hereinbefore given to the separate use and absolute disposal of the said

Bequest of money to trustees,

to be vested in before mentioned stocks, &c.

I also give and bequeath the further sum of £ , of like lawful money, to the said [trustees], their executors, administrators, and assigns, Upon trust, that they the said trustees, or the survivor of them, or the executors, administrators, or assigns of such survivor, do and shall lay out and invest the same in their or his names or name, in any of the stocks, funds, and securities hereinbefore mentioned. And do and shall, with the consent in writing of *Jane B.* spinster, (daughter of A. B. of, &c.) during her life, and after her decease, at their or his own

discretion, alter and vary the said last mentioned sum of £ into other stocks, funds, and securities of a like nature; and the said trustees or trustee for the time being shall stand and be possessed of the said last mentioned sum of £ , and the stocks, funds, and securities in which the same shall be invested, and the interest and dividends thereof, upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisoies, and declarations in favour, or for the benefit of the said *Jane B.* and her child or children respect- In trust for  
ively, as are hereinbefore declared in favour of her chil- legatees and  
the said *Ann B.* and her child or children re- dren, by  
spectively of and concerning the said sum of to former  
£ , hereinbefore given to and for the bene- pressed in a  
fit of the said *Ann B.* and her said child or previous be-  
children respectively, and the stocks, funds,  
and securities in which the same shall be in- quest.  
vested, and the interest and dividends thereof.  
And I do hereby further declare, that if there If no child  
shall be no child of the said *Jane B.* or being of legatee,  
such, the son or sons shall die under the age of her decease,  
twenty-one years, and the daughter or daugh-  
ters shall die under the age of twenty-one years,  
without being or having been married, then,  
after the decease of the said *Jane B.* and such  
failure of her issue as aforesaid, the said sum  
of £ hereinbefore given to or for the be-  
nefit of the said *Jane B.* and her said child or

children respectively, and the stocks, funds, and securities in which the same shall be invested, and the interest and dividends thereof,

In trust, for all the children of another person, in equal shares.

In trust for all and every the child and children of the said *A. B.* by his wife, (other than and except the said *Jane B.*) and if more than one, in equal shares, as

tenants in common. Provided always, and I do hereby declare, that during the minority of the said *Jane B.* the said trustees or trustee for the time being shall receive the said interest and dividends of the said last mentioned sum of £ , and the stocks, funds, and securities thereof, and lay out and invest the same in their or his names or name in any of the stocks, funds, and securities hereinbefore mentioned, so that the same may accumulate in the way of compound interest; and shall and may from time to time alter and vary the accumulations for the time being made into other stocks, funds, and securities of the like nature, at their or his discretion; and at the end of the period hereby limited for such accumulation as aforesaid, the said trustees or trustee for the time being shall stand and be possessed of the accumulations which shall have been made, and the stocks, funds, and securities in which the same shall be invested, and the interest and dividends thereof;

and direction as to application of same.

Upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisoies,

and declarations, as are hereinbefore expressed and declared of and concerning the fund from which such accumulations shall have proceeded.

LXXXIV. I give and bequeath unto the Bequest of said [trustees], the sum of £  
, Upon trust money to trustees,  
that they the said trustees, and the survivor  
of them, and the executors, administrators,  
and assigns of such survivor, do and shall lay with direc-  
out and invest the same in their or his names tions to in-  
vest the  
or name, in the parliamentary stocks or public same.  
funds of Great Britain, or at interest upon  
government or real securities in England or  
Wales, and do and shall, from time to time,  
alter, vary, and transfer the same for or into  
other stocks, funds, or securities of the like na-  
ture. And my will is, that until some child of The interest  
my nephew J. W. shall attain the age of to accumu-  
late until twenty-one years, they the said trustees, or the some child  
survivor of them, or the executors, adminis- of a nephew  
trators, or assigns of such survivor, shall re- attains  
ceive the yearly dividends, interest, and an- twenty-one.  
annual produce of the said sum of £  
, and  
the stocks, funds, and securities in which the  
same shall be from time to time invested, and  
the interest, dividends, and annual produce  
thereof, and accumulate the same in the na-  
ture of compound interest; and do and shall  
alter and vary the said dividends, interest, and  
annual produce, and the accumulations thereof,

for or into any other stocks, funds, or securities of the like nature, at their or his discretion. And I do hereby direct, that when such elder child of my said nephew shall attain the age of twenty-one years, they, the said trustees or trustee for the time being shall stand and be possessed of, and interested in the said sum of £ . . . , and the stocks, funds, and securities in which the same shall be invested, and the interest, dividends, and annual produce thereof, and the accumulations of the same; In trust for all and every the children and child of my said nephew, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain the same age, or be married, which shall first happen, and their respective executors, administrators, and assigns, to be divided between or among such children, if more than one, in equal shares. And if there shall be but one such child, the whole to be In trust for that one child, his or her executors, administrators, and assigns.

Thereupon the trust monies and accumulations to be in trust for all the children of nephew equally.

**LXXXV.** I give and bequeath the sum of £ . . . of lawful money of Great Britain to the said [trustees], their executors, administrators, and assigns, In trust, that they the said trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall invest the same upon government

Bequest of  
money to  
accumulate  
for grand-  
children,

or real securities in England, and accumulate\*  
the same, and the interest, dividends, and an- during lives  
of sons, and

\* In the note on executory devises the rule is stated, which Accumula-  
confines the contingency for the springing up of future and tion.  
executory estates to the compass of a life or lives in being, and  
twenty-one years after, including a sufficient number of months  
for the birth of a child *en ventre sa mere*. In consequence of  
this rule, the Court held, that during the term which the law  
allows for the estate to be suspended from vesting absolutely  
in some person, any *accumulation* of the rents and income of  
settled property, might be carried on either for the benefit of the  
person in whom the estate is to vest at the expiration of the  
term of suspense, or for the benefit of some person answering at  
that time a particular description.

The celebrated will of Mr. Thellusson carried the period of  
accumulation to the utmost limit. In that case, it was admitted  
on all sides, that a trust of accumulation could not exceed the limits  
of executory devise; and it was decided, that so long as an estate  
might be kept from vesting, so long accumulation might be di-  
rected. *Thellusson v. Woodford*, 4 Ves. 227, and 11 Ves. 112,  
and see Mr. Butler's note to his edition of Fearne's Essay, 434.

But the period of accumulation allowed by the common law,  
has been limited by the stat. 39 & 40 Geo. 3, c. 98, whereby  
the power of settling and devising property for the purposes of  
accumulation is restrained within the period of twenty-one years  
after the death of the testator, and a small portion of time, the  
period of gestation; it is therby enacted, "that no person or  
persons shall, after the passing of the act, by any deed or deeds,  
surrender or surrenders, will, codicil, or otherwise soever, settle or  
dispose of any real or personal property, so and in such manner,  
that the rents, issues, profits, or produce thereof, shall be wholly  
or partially accumulated, for any longer term than the life or lives  
of any such grantor or grantors, settler or settlers, or the term  
of twenty-one years from the death of any such grantor, settler,  
devisor, or testator, or during the minority, or respective minori-  
ties of any person or persons, who shall be living or *en ventre sa*  
*mere*, at the time of the death of such grantor, devisor, or tes-  
tator, or during the minority or respective minorities only of any

the survivor, and twenty-one annual produce thereof, during the lives of my sons, and the lives and life of the survivors

Accumulation. person or persons, who under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated, and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, *so long as the same shall be directed to be accumulated contrary to the provisions of the act*, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed." The act does not extend to any provision for payment of debts, or to any provision for raising portions for children of any person taking any interest under any such devise, &c. nor to any direction touching the produce of timber, nor to any disposition respecting heritable property in Scotland. The restrictions are to be in force with respect to wills made before the act—in such cases only where the testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing thereof.

It has been suggested, that the above-mentioned exception for raising portions for children, admits of a latitude, which may be productive in a great degree of all the inconveniences which were felt or apprehended under the rules of the common law, and that by a will or settlement artfully prepared, every purpose aimed at by Mr. Thellusson may be accomplished. Fearne, Ex. Dev. 541, (*note*).

As to trusts for accumulation exceeding the prescribed limits.

An executory devise exceeding the limits allowed by the common law is void *in toto*, and (independently of the statute) the same rule will apply to a trust of accumulation. *Griffith v. Vere*, 9 Ves. 127. The case of *Phipps v. Kelynge*, Fearne's Executory Devises, 616, will not be found to be an authority for the proposition, that a trust for accumulation exceeding the prescribed limits is void only for the excess. There seems room in that case for a severance of the trusts into different portions. Lord

and survivor of them, and the space of twenty- years after  
death of survivor.

Alvanley in the *Thellusson* case said, that *Phipps v. Kelynge* is not properly a case of accumulation; as Phipps had a right to call from time to time for the rents and profits to be laid out in lands to be settled. There was therefore, no period during which the rents and profits of the leasehold estate would have been wholly withdrawn from enjoyment. Still, to a certain degree, there was a trust for accumulation, as the rents and profits themselves were not to be enjoyed, but only the produce thereof, when invested in land or securities. Whether that was a trust wholly void, or void in part, and bad in part under the circumstances of the case, there was no occasion to consider. In *Ware v. Polhill*, 11 Ves. 257, where the rents and profits of a leasehold estate were to go to the persons entitled to the rents of the freehold and copyhold estates, but with a power to the trustees, at any time, with consent of the persons so entitled, or of minors at their own discretion, to sell and invest the produce in real estates to the same uses; the Lord Chancellor held, that notwithstanding the power, the leasehold estate vested absolutely in the first tenant in tail from the time of his birth, and that the power of sale was void, upon the ground, that it might travel through minorities for two centuries; and his lordship observed, that, "If it was bad to the extent in which it is given, it could not be modelled to be made good." In the case of *Lord Southampton v. The Marquis of Hertford*, 2 Ves. & Bea. 54, it was held that a trust for accumulation, during the minorities of the respective tenants for life or in tail, for the benefit of such person who should then be tenant in possession, was too remote, and incapable of modification. The possibility, that Lord Southampton, who was a minor, and the first tenant in tail, might attain the age of twenty-one years, could not be an answer to the objection, that the trust as originally created was too remote. Supposing the accumulation allowed to go on, and he should die under twenty-one, what was to become of the accumulated fund? The deed creating the trust directed it to go to the first person entitled to the estate, who should attain twenty-one, though there should be no such person for a century to come.

of such survivor ; and which lives and term of twenty-one years are to constitute and be the

As to trusts  
for accumu-  
lation ex-  
ceeding the  
prescribed  
limits.

Where a testator devised and bequeathed his real and personal estate to trustees, their heirs, executors, and administrators, upon trust, to convert his personal estate into money, and after payment of his debts and legacies, to lay out and invest in their names, the clear surplus monies arising from his personal estate in the purchase of stock in some of the government or parliamentary funds, or upon real securities in England, and in like manner to lay out and invest the dividends, interest, and annual proceeds of such stocks and securities, and the rest of his personal estate, and also the clear yearly rents and profits of his real estates from time to time, as and when, and so often, and during all such times, as any person or persons, beneficially interested in or entitled to any real and personal estates under the trusts in his will afterwards declared thereof, should be under the age of twenty-one years, adding all such investments to his personal estate, in order to accumulate the same ; the Court held that such direction to lay out and accumulate the said rents and profits, interest, and dividends, was too remote, and void in law. *Marshall v. Holloway*, 2 Swanst. 432.

The following propositions appear to be established by the authorities on this subject ; that where a trust for accumulation is within the statute, the excess will be corrected. That if part of such trust would have been bad before the act, that part remains bad, notwithstanding the act ; that if property be given, subject to a trust which is bad, the gift of the property takes effect exempt from the trust. That where a direction is void at common law, and not under the statute, the Court cannot sever the trusts into different portions, but as one entire gift it will be void *in toto*, for otherwise it would contravene the law against perpetuities.

It may therefore be observed in conclusion, that it appears inaccurate to say, in general terms, that every trust for accumulation, exceeding the allowed limits, is void only for the excess ; but the true principle seems to be, that where there is room for a severance of the trust of accumulation into different portions, then the excess only will be bad.

period of the accumulation of the said sum of £ ; And shall stand possessed of and interested in the said sum of £ , and the stocks, funds, and securities upon which the same shall be laid out and invested, and the resulting income, produce, and accumulations thereof, upon the trusts hereinafter mentioned; that is to say: In trust, that as soon as I shall have any grandchild who, during the said period of accumulation, shall attain his or her age of twenty-one years, they the said trustees or trustee for the time being, shall thereupon raise out of the said sum of £ , and the stocks, funds, and securities upon which the same shall be invested, and the interest, dividends, and annual produce thereof, and the accumulations of the same, the sum of £ and pay the said sum of £ to such grandchild; and in the same manner raise and pay a like sum of £ for the grandchild who shall secondly attain the age of twenty-one years, during the said period of accumulation; and in the same manner raise and pay to each grandchild attaining the age of twenty-one years, as and when he or she shall attain that age during the said period of accumulation, the like sum of £ , until the whole of the said fund shall be exhausted; and the last of the said grandchildren shall have the proportionable part of the said funds, if the overplus thereof, after paying the said trust sums of £

As soon as  
any grand-  
child attains  
21 (the pe-  
riod of ac-  
cumulation)  
a certain  
sum to be  
paid to him,  
and so on  
till the fund  
be exhaust-  
ed.

If fund be  
not exhaust-  
ed, the re-  
mainder to  
be in trust  
for such as  
last attains  
21.

shall be less than the sum of £ . . . But in case the number of my grandchildren attaining the age of twenty-one years during the said period of accumulation, shall not be sufficient to exhaust the whole of the said funds by payments of £ . . . to each of my grandchildren attaining the said age of twenty-one years during the said period of accumulation, then and in that case the whole of the said sum of £ . . , and the stocks, funds, and securities on which the same shall be invested, and the interest, dividends, and annual produce of the same, and the resulting income, and the produce and accumulations thereof, or such part of the same as shall remain, after answering the said payment or payments of £ . . . , shall be in trust for such of my grandchildren as last or alone shall, during the said period of accumulation, attain the age of twenty-one years.

Bequest of  
money, se-  
cured by a  
term of years  
to trustees,  
for the pur-  
pose of ac-  
cumulation,

LXXXVI. And I give and bequeath unto the said [trustees], their executors, administrators, and assigns, the sum of £ . . . , which I have directed to be raised under the trusts of the said term of six hundred years [*see Index, "Terms of Years"*]]; Upon trust, that they the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, shall receive the interest and annual produce thereof, and lay out and invest the said interest in their or his names or name, in the purchase of parliamentary stocks

or public funds of Great Britain, or at interest on government or real securities in England, and repeat such receipts and investments, so that the residue and the interest thereof, and the resulting income and produce of the same, may accumulate in the nature of compound interest, until such a sum of money shall be raised as, jointly and co-ordinately with the funds directed to be accumulated under the aforesaid term of twenty-one years, shall amount to a sum sufficient to pay off the monies directed to be raised under the trusts of that term, in aid of my personal estate, for the payment of my funeral expenses, debts, and legacies, and of the said sums of £        and £        . And I direct that the money which shall be raised by the accumulation of the interest of the said sum of £        , shall, so soon as the same shall amount to a sufficient sum, be applied, jointly and co-ordinately as aforesaid, in discharge of the money raised for making good such deficiency as aforesaid of my said personal estate, in answering my said funeral expenses, debts, and legacies, and the said sums of £        and £        . And I direct, that until the money raised under both the said accumulations shall amount to a sufficient sum for the purposes aforesaid, the said accumulations shall be made co-ordinately, and without any priority or posteriority in respect of either of the said funds; and that, when the said accu-

until a sum  
be raised  
which,  
jointly with  
a fund di-  
rected to ac-  
cumulate for  
21 years,  
will be suffi-  
cient for cer-  
tain pur-  
poses.

mulations shall have reached the amount hereinbefore mentioned, the accumulation of the said estate, comprised in the said term of twenty-one years, shall be protracted to the end of the said term of twenty-one years, in the manner and for the purposes hereinbefore mentioned. But that, so soon as the accumulations shall have reached the amount hereinbefore mentioned, the said sum of £      shall sink into and be consolidated with the freehold  
 Declaration and inheritance of the said estates. And the  
 as to residue then residue of the said term of six hundred  
 of term. years, created for securing the said sum of £      , and the interest thereof, as hereinbefore is mentioned, shall be assigned and disposed of, so as to merge or be attendant upon the inheritance of the same estates.

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#### DEVISES OF REAL ESTATE\*.

\* Lord Bacon observes, that one of the reasons why so much land was conveyed to uses was, because persons acquired by that means a power of disposing of their property by will, and were thus enabled to make a much better provision for their families than they could otherwise have done. Wills were enforced in Chancery as good declarations of the use; and thus, through the medium of uses, the power of devising was continually exercised in effect and reality. But when the statute of uses (27 Hen. VIII. c. 10) had annexed the possession to the use, these uses, being then the very land itself, became no longer devisable. However, the bent of the times was so strongly in favour of alienation, that the legislature in a few years after, (having interposed to restrain the indirect mode of devising invented to evade the

statute of uses), expressly made land devisable. This great change of the common law was effected by the statutes 32 and 34 Henry VIII. which, taken together, gave the power of devising to all persons having estates in fee-simple, (except in joint-tenancy), over the whole of their soccage land, and over two-thirds of their lands holden by knight's service. The operation of these statutes was completely extended by the conversion of knight's service into soccage by the statute 12 Cha. II., and estates *pur autre vie* were soon afterwards (29 Cha. II.) rendered devisable in the same manner as estates in fee-simple. As the power of devising copyhold estates is indirectly exercised by an application of the doctrine of uses, (similar to that which was anciently resorted to in respect to freehold lands), it appears that the power of devising is now exercisable, either directly or indirectly, over land of every tenure now in use, and also over every sort of interest in land, which, not being fettered with tails, can be transferred by alienation taking effect in the owner's life-time. Hargr. Note 1. Co. Litt. 111 b.

Contingencies and mere possibilities, arising by virtue of executory devise or a springing use, are devisable. "James Grubb devised all his real estates in trust for his son James, and if he should die without issue under age, then that all his estates should go to Cochran, his heirs and assigns." Cochran devised "all the estates whereof he was seised in possession, remainder, or reversion, to Selwyn," and died in the lifetime of James Grubb, the son, who afterwards died under twenty-one, and without issue. On a bill brought by the devisee of Cochran, a question was made, Whether the possibility given to Cochran was devisable? Lord Northington said, "I have never had any doubt, since I was twenty-five years old, but that these contingent interests were devisable, notwithstanding some old authorities to the contrary. I sent this question, however, into the King's Bench, in the case of *Selwin v. Selwin*, for the satisfaction of the parties; and the certificate of the Judges in that case implies, I think, that they agreed with me in this opinion." And he added, "the point is settled, and ought not to be shaken; it is a liberal and right determination." *Selwin v. Selwin*, 1 Black. 222. 2 Burr. 1131. *Roe dem. Perry against Jones*, 1 H. Blac.

30. And see Fearne's Contingent Remainders, 866, 371, 548. But a mere right of entry (the estate of the remainder-man having been divested by the fine of tenant for life) is not devisable. *Fowler v. Forrester*, 8 East, 552. It is necessary that the devisor should have at least that kind of inchoate seisin, or title, which is conferred by a contingent remainder.

**When the heir takes by descent, and when by purchase.** Descent, or hereditary succession, has been defined to be the title whereby a person, on the death of his ancestor, acquires his estate by right of representation, as his heir at law. Now, where a devise of lands to the heir conveys the same estate as the law would cast by descent, the heir will take by descent, for the tenure is not altered; and such will be the case, although the land be charged with debts and incumbrances. *Emerson v. Inchbird*, 1 Lord Raym. 728. *Allam v. Heber*, 2 Str. 1270. But if the tenure or quality of the estate be altered, the heir is a purchaser. *Scott v. Scott*, Amb. 383. *Wills v. Palmer*, 2 Bl. Rep. 687.

In case of a devise of lands to a trustee, until the heir attains twenty-one, and then to such heir in fee, with an executory devise over, in case he does not attain twenty-one, it was held, that the heir took by descent, because the devise being construed to be an absolute devise in fee to the heir, it was the same estate as he would have taken by descent, and he was therefore held to take by that preferable title, and not by purchase—the defeasibility of the estate, upon the happening of the event which was contemplated by the will, making no difference. *Haynesworth v. Pretty*, Cro. Eliz. 833. *Doe dem. Pratt v. Timins*, 1 Barn. & Ald. 530. And again, where a testator devised his estates to his wife for life, and after her decease to his heir at law, charged with the payment of certain sums, and in default of payment at the time appointed, to a trustee, his heirs, executors, administrators and assigns, upon trust, to raise the money by sale or mortgage of a sufficient part of the lands, and subject thereto to his said heir at law, his heirs, executors, administrators and assigns, it was held that the son took by descent and not by purchase. *Chaplin v. Leroux*, 5 Maule & Selwyn, 14. So, if a devise be to A. for life, remainder to the heir of the devisor in fee, the heir takes by descent, though it be a remainder, for it makes no alteration in the nature of his estate. So if a de-

vise be to *A.* till his heir attains the age of twenty-four, and then to him in fee, and that his wife shall have a third part for her life; and if he dies before twenty-four, to his wife for life; and if his heir has no issue, to his daughter in tail. 1 Rol. 626, 645. If a testator devise to his sons and a stranger, or to two or more of his sons in common, (one being his heir), the son who is the heir shall take his portion by descent. For, suppose a devise of the moiety, or any other undivided share, to a stranger, and no disposition made of the remaining undivided share, that share would of course descend to the heir at law, and he must hold it in common with the devisee of the other undivided share. And it is immaterial whether the share taken by the heir is expressly devised to him or left unnoticed by the will. Fearne Post. Works, 130.

It is not in the election of the heir to be in by purchase or by descent, for the law casts the descent on him immediately on the death of the ancestor, and the devise is absolutely void. Could the heir, according to his election, have taken by purchase, he might have defeated the lord of many emoluments of his seigniory, and might, previously to the stat. Wm. III. against fraudulent devises, have deprived the specialty creditors of the ancestor of the fund which was answerable for their demands.

The distinction between the mode of acquiring real property by descent and by purchase is frequently very important; for where an estate has really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed, and no heirs are admitted but the heir of those through whom the inheritance has passed; for all others have none of the blood of the first purchaser in them, and therefore shall never succeed. Suppose an estate to descend to *A.*, as heir to his mother, and *A.* dies without issue, his heirs, on the part of his mother, shall inherit, and not the heirs on the part of the father; and *e converso*, if the estate descend from the father, it shall devolve on the heirs of the paternal line, to the exclusion of the heirs *ex parte maternæ*. If, however, the descent of the estate from the mother be once broken, and the heir take by purchase, then the estate, acquiring a new inheritable quality, and the owner becoming the stock of descent, it is descendible to the owner's blood in general, first of the paternal and afterwards of the maternal line. See Watk. Desc. *passim*.

Simple de-  
vise in fee.

LXXXVII. I give and devise all that my estate, called , with the rights, members, and appurtenances thereunto belonging, situate at in the county of , unto A. B. of, &c. his heirs and assigns for ever.

Recital of  
power of  
appoint-  
ment.

LXXXVIII. And whereas by indentures of lease and release, bearing date respectively on or about the and days of , the release, being the settlement made previously to the marriage of me the said *A. B.* with my said wife *Jane*, (then *Jane* , spinster), certain manors and other hereditaments situate in , in the county of , were limited, and assured from and after the decease of me the said *A. B.*, and of my said wife in case she should survive me, and in default of issue of me the said *A. B.* and my said wife, to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoies, declarations, and agreements as I the said *A. B.* should, by any deed or instrument in writing, executed as in the same indenture of settlement is mentioned, or in and by my last will and testament in writing, or any codicil or codicils thereto, to be by me signed and published in the presence of, and attested by three or more credible witnesses, direct, limit, or appoint; and in default of such direction, limitation, or appointment, and so far as any such direction,

limitation, or appointment should not extend, to the use of the heirs and assigns of me the said *A. B.* Now I the said *A. B.* pursuant to, Exercise of and by force and virtue, and in exercise and execution of the power\* or authority to me for this purpose given or reserved by the said indenture of settlement as hereinbefore is mentioned; and of every other power or authority in anywise enabling me in this behalf, do, by this my last will and testament in writing, by me signed and published in the presence of, and attested by the three credible persons whose names are hereunder written, as witnesses hereto, direct, limit, and appoint, that from and after the decease of my said wife, to trustees and in default of issue of me the said *A. B.* by sell, &c. in trust to my said wife, all and every the said manors and other hereditaments, with their and every of their rights, members, and appurtenances, shall go, remain, and be. And I do hereby give and devise the same unto, and to the use of the said [*trustees*], their heirs, executors, administrators, and assigns, Upon the trusts, and for the ends, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same; that is to say: Upon trust, &c.

\* Any words, however informal, which clearly indicate an intention to give or reserve a power, are sufficient for the purpose. Powers: It rests in the breast of the person creating or reserving a power, to impose such ceremonies as he thinks proper. A power over

General  
devise to  
trustees:

**LXXXIX.** I give and devise to [trustees], all and every the manors, messuages, lands,

real estate may be directed to be executed by a simple note in writing, or by will unattested or attested by only one or two witnesses. Lord Hardwicke said, that the statute of frauds is entirely out of the question, except so far as it is the rule which the donee is directed to follow in the execution of the power. The will operates by appointment, though the party may arbitrarily insert the rules prescribed by the statute. *Wilkes v. Holmes*, 9 Mod. 485. *Day v. Thwaites*, 3 Ch. Ca. 69. *Saunders v. Owen*, 2 Salk. 466. But where a power is given in general terms to appoint the uses of land by deed or will, it must be intended that the will be such an one as is proper for the disposition of land, consequently, subscribed by three witnesses in the presence of the testator; for this is within all the inconveniences that the statute of frauds is intended to prevent. The words "in the nature of a will," mean, the same as a will, which must therefore be attested in the same manner. *Longford v. Eyre*, 1 P. Wms. 739. Of course, a man cannot by deed reserve to himself a power over real estate, to be executed by his own will, unattested or attested by only one or two witnesses, for that would, in fact, be merely an evasion of the statute of frauds. *Habergham v. Vincent*, 2 Ves. Junr. 204.

An intention  
to execute  
the power  
must ap-  
pear.

A mere general devise, however unlimited in terms, will not comprehend the subject of the power, unless it refer to the subject or to the power itself, or generally to any power vested in the testator. *Buckland v. Barton*, 2 H. Black. 136. *Doe dem. Hellings v. Bird*, 11 East, 49. But it has been long settled that it is not necessary, for the purpose of executing a power, that it should be recited in *express terms*. The intention must, however, distinctly point to the subject. *Andrews v. Emmot*, 2 Bro. C. C. 297. *Bennett v. Aburrow*, 8 Ves. 616. Where a person, who had no other real estate than that over which the power rode, by will executed with three witnesses, devised all her estate and effects, of what nature or kind soever, whether real or personal, the power was held to be executed. *Standen v. Standen*, 2 Ves. Junr. 589. The principle is, as to real estate, that where there is nothing for the will to operate upon, but with reference to the

Difference  
of the rule  
as to real  
estate and  
personalty,  
where the  
power is not  
expressly  
referred to

tenements, and hereditaments, and all other the real estates whatsoever and wheresoever,

power, it must operate as an execution of the power. But, by the will where a testatrix, having a power to dispose of a fund consisting of real and personal estate, by her will executed and attested so as to pass real estate, devised "all her estate and effects of whatsoever denomination, likewise her household furniture, with linen and plate, &c." Sir Thomas Plumer, M. R. considered, that the will contained no words which would be without operation, unless referred to the power. On the contrary, the testatrix used terms of generality "all her estate and effects of whatever denomination." Though she had no real estate, she might have personal property of various descriptions, and the terms would be satisfied by passing that, consequently the power was not executed. *Jones v. Curry*, 1 Swanst. 66. With regard to real estate, the court may examine whether the circumstances of the testator's property are such as to give effect to the will as an execution of the power; and the court will resort to the power, if there be no other property to satisfy the will except the real estate, the subject of the power. *Standen v. Standen, supra.* *Lewis v. Lewellyn*, 1 Turner, 104. With respect to personal property, there must be some reference to the power; because every person is possessed of some personality, and the court will not look beyond the face of the will to enquire into the quantum, however inadequate the testator's property may be to satisfy the terms of the will, unless the subject of the power be included. The state of his personality at the time the will was made, or at the time of the death of the testator, will not be examined for the purpose of collecting his intention. In *Jones v. Tucker*, 2 Meriv. 533, an inquiry into the circumstances of the personal estate of the testatrix was refused, although she had given the precise sum which she was empowered to dispose of, and had no fund out of which otherwise to satisfy the bequest: The Master of the Rolls at the same time declaring his private opinion, that she had designed to dispose of the fund which was the subject of the power.

As a general rule, it must be remembered, that all the forms and circumstances prescribed by the instrument creating the power, must be strictly observed. *Hawkins v. Kemp*, 3 East, be observed.

of or to which I, or any other person or persons in trust for me, am, is, or are seized or

410. *Wright v. Wakeford*, 17 Ves. 454. *Et vide Doe dem. Mansfield v. Peach*, 2 Maule & Selwyn, 576. To give an example—Where lands were limited by deed of settlement as to one moiety for such person and persons, and for such estate and estates, intents and purposes, and subject to, with, and under such charges, conditions, provisoies, restrictions and limitations, and in such manner as one should by any deed or deeds, instrument or instruments, in writing, to be by her sealed and delivered in the presence of two or more credible witnesses, or by her last will and testament in writing, or by any writing or appointment in the nature of a will, to be by her signed and published in the presence of and attested by two or more credible witnesses, (and which deed and writings, and will or writing in the nature of a will, notwithstanding coverture, she was empowered to make), should direct or appoint. The testatrix bequeathed to her husband the property over which the power was reserved to her. The will concluded with these words, “signed by me, Sarah Moodie;” it was attested thus, “Witness,” A. B., C. D. Evidence was adduced, proving, by the attesting witnesses, that the testatrix signed her name and published the instrument, which they understood to be her will, and that they set and subscribed their names thereto, in the presence of the testatrix, and in the presence of each other. The power in this case being given by a marriage settlement, the execution of it was a mere voluntary act, and the husband could not be considered as a purchaser. A case was sent to the Court of Common Pleas, to which the Judges returned a certificate, that the will or appointment in nature of a will was not a due execution of the power. *Moody v. Reid*, 1 Madd. 516, 2 Madd. 156.

In *Stanhope v. Keir* the power was to be executed by the last will and testament in writing of the donee, or any codicil or codicils to the same, “signed and published by her, in the presence of, and attested by three or more credible witnesses;” a will was signed in the presence of three witnesses, but the attestation was merely in these words, “in the presence of;” from which the Court could only assume, that the witnesse

Defective  
execution.

entitled, for an estate of freehold and inheritance, or of freehold only, or which are of the

saw the testatrix *sign* the instrument, which was not therefore a good appointment. 2 Sim. & Stu. 37.

Where a power was given to appoint lands by the joint deed of the donees, the power was not well executed by the will of the survivor. *Earl of Darlington v. Pulteney*, 1 Cowp. 260. Where a power was given to charge lands by will *sealed* and attested by three or more witnesses, the Court of King's Bench decided (contrary to the opinion of Lord King), that the power was not well executed by a will duly signed and attested, but *not sealed*. *Dormer v. Thurland*, 2 P. Wms. 505. So, where a power is given to charge an estate by will, the donee cannot execute it by deed in his life-time. *Reid v. Shergold*, 10 Ves. 370. *Anderson v. Dawson*, 15 Ves. 532. And where a testator devised all his freehold estate to his wife during her life, and to be at her disposal afterwards to whom she pleased, it was held, that this only gave her a power to leave it by will; and that, therefore, an execution of the power by deed in her life-time was void. *Doe d. Thorley v. Thorley*, 10 East, 438.

The stat. 54 G. 3, c. 168, which was occasioned by the decisions in *Wright v. Wakeford*, 4 Taunt. 213, *Doe d. Mansfield v. Peach, supra*, and was passed, as the title of the act expresses, "for the purpose of amending the law respecting the attestation of instruments of appointment and revocation made in exercise of powers," has only a *retrospective* operation. Parties entitled to its benefit are allowed to supply by evidence the fact of the signing, if the witnesses have omitted to state it in the attestation. Powers executed *since* the passing of the act, of course are not within its remedy; nor can any great evil be apprehended from the enactment not being prospective. The subject having undergone so much discussion, it is to be concluded, that the decisions on the subject are generally known.

It has been already observed, that equity will in many cases relieve against a defective execution of a power; as, for instance, in favour of a wife, a child, a purchaser, and a creditor. The court will not supply a defective execution in favour of any other execution of

nature of copyhold or customary tenure, in possession, reversion, remainder, or expect-

the power is persons. In *Sergeson v. Sealey*, 2 Atk. 411, the defect was defective. supplied in favour of a husband, because there was the valuable consideration of marriage, he was a purchaser by marriage, and it was on this ground that Lord Hardwicke gave relief; there is no case, where such an equity has been given to a husband merely as such. *Vide* the judgment in *Moodie v. Reid, supra*.

A father having a power to make a provision for his children by deed, made it by will for children before provided for, and it was held good. Ambl. 64. A power was given to a husband to make a jointure on his wife, by deed under his hand and seal; he executed the power by his last will under his hand and seal; the wife was otherwise unprovided for. The Master of the Rolls supplied the defect, observing upon the difference between a non-execution and a defective execution of a power, that the latter would always be aided in equity, be it either for payment of debts or provision for a wife or children unprovided for, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But the court would not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party, whether to execute or not; for which reason equity will not say, he shall execute it, or do that for him which he does not think fit to do himself. *Tollet v. Tollet*, 2 P. Wms. 489. It should be observed, that equity will frequently support appointments deviating considerably from the letter of the powers under which they were made. It has been held, that a power to appoint an estate in land, includes a power to dispose of the estate, and appoint the produce; the same effect has been given in a more doubtful case of a power to charge an estate; and a power to appoint the money produced by an estate directed to be sold, has been considered as a power to appoint the estate itself. *Standen v. Standen, supra*; *Bullock v. Fladgate, 1 Ves. & Bea. 471.*

ancy, or of which I have power to dispose or to appoint by this my will, with their rights,

latory, revocable, and incomplete till the death of the testator; executing a nor can any one dying in the testator's life take under it, for it power; is a principle of law, that there must be a donee or appointee, may be re-to take at the death of the testator. Should the instrument, by which the power is executed, be held to be neither a will nor an instrument in the nature of a will, it would be an instrument irrevocable. *Oke v. Heath*, 1 Ves. 134. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61. A will made in execu-tion of a power will be revoked by any act, amounting to the revocation of a proper will. *Shore v. Pincke*, 5 T. R. 124. *Reid v. Shergold, supra*. *Ex parte Earl of Ilchester*, 7 Ves. 348. But, although the execution of a power by will, may be re-voked, or rather altered as frequently as the testator may choose, it is the nature of the will itself, which renders the execu-tion revocable, for the rule of law is, that if a power be once executed, and no power of revocation reserved, it cannot be re-voked and executed anew. *Lord Teynham v. Webb*, 2 Ves. 197.

So where a person who had a power to revoke, and appoint new uses as often as he pleased, executed the power by deed, and of revoca-tion by revoked; and so, a second and third time. It was held, that the party could not revoke *toties quoties*, by virtue of the original power of revocation. He might have reserved a new power had he pleased; which not having done, he had previously executed his power. *Hele v. Bond*, Prec. Cha. 474. Under a power of revocation, part may be revoked at one time, and part at another; but not the same part twice, unless a new power of revocation be reserved, *Digge's case*, 1 Co. 173 b. *Anon. 1 Str. 583. Zouch d. Woolston v. Woolston*, 2 Burr. 1136. A power of revocation may be reserved, although not expressly authorized by the deed creating the original power, and such power may be reserved *toties quoties*. *Adams v. Adams*, 2 Cowp. 651.

Where a person takes by execution of a power, whether of realty or personality, it is taken under the authority of that appointees power. The meaning, that the persons must take under the take under

members, and appurtenances (except such estates as are vested in me in trust [*upon any trust or trusts whatsoever*], or by way of mortgage, with their rights, members, and appurtenances), To hold the same unto and to the use of the said [*trustees*], their heirs and assigns, according to the nature and quality thereof respectively, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoies, and declarations hereinafter expressed and declared of and concerning the same.

*and bequest  
of all the  
personal  
estate;* And I give ~~and~~ bequeath all and every my leasehold estates, lands, and tenements, and all my goods, chattels, capital, and stock in trade, money and securities for money, debts and other personal estate and effects of what kind soever, of, in, or to which I, or any person or persons in trust for me, shall be entitled at the time of my decease, (except such part or parts thereof, as I shall or may by this my will, or by any codicil or codicils thereto dispose of

*the original  
power, ex-  
plained.* power or use, as if their names had been inserted in the power, is, that they shall take in the same manner, as if the power and instrument executing the power had been incorporated in one instrument: then they shall take, as if all that was in the instrument executing, had been expressed in that giving the power, but they do *not take as from the time when the power was created.* *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61.

In concluding this note, it is proper to acknowledge the assistance derived from Mr. Sugden's Treatise on Powers. That valuable work cannot be too strongly recommended to the attention of the student, anxious to acquire a complete knowledge of the subject.

specifically, or what I otherwise dispose of by this my will) unto the said [*trustees*], their executors, administrators, and assigns, according to the nature and quality thereof respectively, Upon the trusts, and for the intents and purposes hereinafter expressed and contained of and concerning the same. And I do hereby declare my will and mind to be, that my said real and personal estate hereinbefore devised and bequeathed to the said [*trustees*], their heirs, executors, administrators, and assigns, respectively, as aforesaid, are so devised and bequeathed, Upon the trusts, intents, and purposes, and with, under, and subject to the powers provisoes and declarations, hereinafter expressed and contained of and concerning the same respectively (that is to say), Upon trust, that they the said [*trustees*], and the survivor of them, and the heirs, executors, administrators, and assigns, respectively, of such survivor do and shall, with all convénient speed after my decease, call in and convert into money my said personal estate, or such part thereof as shall not consist of money or government securities, stocks or funds, or mortgages upon real estates; And do and shall absolutely sell or dispose of my said freehold, leasehold, and real estates, either entirely and altogether, or in parcels, by public auction or private contract, to any person or persons willing to become the purchaser or purchasers

Upon trust,  
 to sell and  
 convert  
 same into  
 money.

Indemnity  
to pur-  
chasers.

thereof respectively, for such price or prices, or sum or sums of money as to the said [*trustees*], or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor shall seem reasonable; And for promoting and facilitating such sale or sales, do and shall enter into, make, and execute all such contracts, covenants, agreements, conveyances, surrenders, assurances, acts, deeds, matters, and things which to my said trustees, or the survivor of them, or the heirs, executors, or administrators of such survivor, respectively, shall seem reasonable. And I do hereby declare, that the receipt or receipts of the said [*trustees*], and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, for any money payable to them or him under this my will, shall effectually discharge the person or persons paying the same from being answerable or accountable for the misapplication or non-application thereof, or of any part thereof, or from being obliged to see to the application thereof, or of any part thereof, or to enquire into the necessity or propriety of any sale or mortgage that may be made or accepted by virtue of this my will; and that no person purchasing or advancing money on mortgage of my freehold estates, or any part thereof, shall be bound or obliged to ascertain or enquire into the necessity, propriety, or expediency of any such sale or mortgage.

And I do hereby declare my will and mind Declaration  
 to be, that the said [*trustees*], and the survivor as to money  
 of them, and the executors, administrators, and arising  
 assigns of such survivor, do and shall stand  
 and be possessed of, and interested in all the  
 money to arise from the sale or sales herein-  
 before by me directed to be made of my real  
 and leasehold estates, or to arise and be pro-  
 duced from that part of my personal estate  
 which I have directed to be converted into  
 money. And of and in the monies, government  
 securities, stocks, or funds and mortgages on  
 real estates, of or to which I shall be possessed  
 or entitled at the time of my decease, and of  
 and in the rents, issues, and profits, interest,  
 dividends, and annual produce thereof, until  
 the same shall be respectively disposed of and  
 converted into money, or otherwise howsoever,  
 Upon trust, that they the said [*trustees*], and  
 the survivor of them, and the executors, ad-  
 ministrators, or assigns of such survivor do  
 and shall, &c.

XC. I give, devise, and bequeath all and Devise to  
 every my freehold and leasehold messuages, two children  
 farms, lands, chief rents, tenements, heredita- as tenants in  
 ments, and real estate whatsoever, and parts common in  
 and shares of messuages, farms, lands, chief fee.  
 rents, tenements, and other hereditaments, si-  
 tuate, lying, and being in the several counties  
 of and , or elsewhere, unto and

equally between my two children A. and B. [or unto and equally amongst all and every my children who shall be living at the time of my decease], and their respective heirs, executors, administrators, and assigns for ever, or for and during all my estate, term, and interest therein respectively, to take and hold as tenants in

In case either die under 21 and without issue, the share of such to go to survivor in fee.

common, and not as joint tenants. And in case either of them my said children shall die under the age of twenty-one years, and without leaving lawful issue him or her surviving, then I give, devise, and bequeath the part or share of him or her so dying, of and in the said hereinbefore devised hereditaments and premises unto the survivor of them, his or her heirs, executors, administrators, and assigns for ever, or for and during all my estate and interest therein respectively\*.

As to joint-tenancy.

\* The creation of an estate in joint-tenancy depends on the wording of the deed or devise under which the title is claimed; for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. The interest of two joint-tenants is not only equal and similar, but also is one and the same. One has not originally a distinct moiety from the other; but if by any subsequent act, as by alienation or forfeiture of either, the interest becomes separate and distinct, the joint-tenancy instantly ceases. But whilst it continues, each of two joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. The properties of a joint-estate need not be set forth in this note; they are stated in 2 Bl. Com. 180. The right of survivorship also takes place as well between joint-tenants of goods and chattels in possession or in right, as between joint-tenants of inheritance or freehold. Litt. 281. Co.

XCI. I do hereby give and devise unto [trustees], and their heirs, All and singular the ma-

Litt. 182 a. But an exception is to be made of two joint merchants; for the wares, merchandizes, debts, or duties which they have as joint merchants or partners, shall not survive, but shall go to the executors of him who dieth; for the rule is, that *ius accrescendi inter mercatores locum non habet pro beneficio commercii.* Co. Litt. 182 a. See more fully as to this subject, *Lake v. Gibson*, 1 Eq. Abr. 290. *Jeffries v. Small*, 1 Vern. 217.

It is seldom that a joint-tenancy is intentionally created by devise, but it principally arises from inaccuracy in the penning of the will. The best mode of creating an estate in joint-tenancy, is to limit to A. B. and C. D. and their heirs, if it be an estate in fee. The limitation sometimes made to A. B. and C. D. and the survivor of them, and the heirs of such survivor, is objectionable, as it has been supposed to give a contingent remainder to the survivor, and therefore that the reversion in fee, during the suspension of the contingency, would descend on the heir at law. Butl. note, Co. Litt. 191 a. *Vick v. Edwards*, 3 P. Wms. 372. Watkins's Convey. c. 11.

Where a person devised to his wife for her life, and after her death to his daughter *Isabella* and her children, and their heirs for ever. *Isabella*, at the time of making the will, had one daughter, *Elizabeth*, and afterwards two sons and one daughter, who all died without issue. After several arguments, the Chief Justice delivered the resolution of the Court, that *Isabella* took as joint-tenant. It being stated, that at the time of making the will she had a child, which has been construed to be equal to children; 2 Vern. 106. Co. Litt. 9 a, is express, that to A. et *liberis suis*, and their heirs, is a joint fee to all. And it is no objection that by this means the several estates may commence at different times. *Oates dem. Hatterly v. Jackson*, 2 Str. 1172. But it is to be observed, that where the children were held to take jointly with the parent, the children must be understood to be parties to the grant; for it is said, that otherwise they can only take where the limitation is to them by way of re-

nors or lordships, or reputed manors and lordships, advowsons, rectories, messuages, farms,

remainder. Cro. Eliz. 10. A devise to two persons, without words of severance being expressed, confers a joint-tenancy. *Stuart v. Bruce*, 3 Ves. 632. And the conveyance by one will sever the joint-tenancy, and pass a moiety. But in such a case, if the devise be to husband and wife, they take by entireties and not by moieties; and the husband cannot by his own conveyance divest the estate of his wife. *Doe dem. Freestone v. Parratt*. 5 T. R. 654. From the unity of their persons by marriage, they have each the whole estate in the lands entirely as one person; and, on the death of one of them, the entirety; for all the estate belongs to the other, and neither of them alone has power to alien to prejudice the right of the other. Preston on Estates, 46. Thus where land was devised to husband and wife in fee, it was held that the conveyance of the husband alone, without the concurrence of his wife, passed no interest against the wife surviving. *Doe dem. Freestone v. Parratt, supra*: and see *Back v. Andrews*, 2 Vern. 120. Where a testator devised the residue of his property to his daughters, as tenants in common, and afterwards made a codicil expressly for a particular purpose, but thereby also redevised to his daughters, omitting the words of severance; it was held, that the daughters took as tenants in common; the codicil being construed by the will. *Matthews v. Bowman*, 3 Anstr. 727.

If a joint-tenant devise his share in lands, and dieth, the devise is void, and the cause is for that no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion. Litt. 287. Though both their claims commence at one instant, yet in consideration of law there is a priority of time in an instant, as here the survivor is preferred before the devisor; for Littleton saith, that the cause is that no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion. Co. Litt. 185 b. Joint-tenants may of course acquire a power of devising by severing the joint-tenancy. This severance should be made as a preliminary step

**lands, tenements, and hereditaments, comprised in or mentioned in the first schedule, and the**

before any attempt is made to devise the land; otherwise, although the severance be made after the execution of the will of a joint-tenant, the devise would be void.

Tenancy in common only requires unity of possession; there may be an entire disunion of interest, of title, and of time. Tenancy in common may be created either by the destruction of a common-joint-tenancy or coparcenary, or by limitation. 2 Bl. Com. 192. Very slight expressions are allowed to be sufficient to render a tenancy several. Courts of equity are far from favouring joint-tenancy. *Heathe v. Heathe*, 2 Atk. 121. It may be laid down as a general rule, that wherever there are words in a devise, indicating that the devisees shall take several and distinct shares, they will be tenants in common. Thus a devise to several persons, their "heirs and assigns, all of them to have part and part alike, and the one to have as much as the other," was held to confer a tenancy in common. *James v. Collins*, Cro. Car. 75. "Equally," as well as "equally to be divided," implies a division, and is a tenancy in common. *Denn v. Gaskin*, 2 Cowp. 657. "Share and share alike," has been held these two hundred years to be a tenancy in common. The word "respectively" will make a tenancy in common. *Heathe v. Heathc, supra*. A devise to J. P. and J. H. generally, and directing that the "rents shall be equally shared and divided between them as aforesaid," was held to create a tenancy in common. *Prince v. Heylin*, 1 Atk. 493. The words "unto and amongst the children," &c. were held to give a tenancy in common. *Campbell v. Campbell*, 4 Bro. Ch. Ca. 15. A simple bequest of a legacy or a residue to A. and B., without more, is a joint tenancy, and it is for the other side to shew from some part of the context applying to that bequest, that the words are not to have their legal operation: accordingly, in *Campbell v. Campbell*, where two-thirds of a residue were given to and amongst the children of A. and B., they took as tenants in common, but the remaining third, being given to the children of C., they took as joint-tenants. *Crooke v. De Vandez*, 9 Ves. 197. A devise to several, and the survivors and survivor of them, and the execu-

second item of the second schedule, annexed to the end of the hereinbefore recited inden-

tors and administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants, is a tenancy in common in fee. The words "survivors and survivor," shall not destroy and control the plain intention of the testator, but shall be considered as relating to the death of the testator. *Rose d. Vere v. Hill*, 3 Burr. 1882. *Blissett v. Cranwell*, 1 Salk. 226. *Stringer v. Phillips*, 1 Eq. Abr. 292. *Garland v. Thomas*, 1 New Rep. 82; to which last case it may be sufficient to give a reference, without citing other examples, as all the cases on the subject are there referred to.

As to partition. Joint-tenants, and tenants in common, are compellable to make partition; see Hargr. note, Co. Litt. 169 a. Originally,

tenants in common, and joint-tenants, could not have compelled the others to come to a partition; which was remedied by the stat. 31 & 32 Hen. 8, and 8 & 9 Wm. 3, c. 31. Courts of equity have a concurrent jurisdiction with courts of law upon partition; and this probably obtained on account of the difficulty attending the process of partition at law. A bill for partition is a matter of right, and there is no instance of not succeeding in it, except where there is not proof of title in the plaintiff. And even where the strongest arguments of inconvenience imaginable were used, they were not allowed to prevail. Where the plaintiff was entitled to 400 acres, and the defendant to 4 or 5 only, and though the defendant would rather have given up his part than have been at the expense of a partition, yet it was decreed, and to be at the equal expense of both parties. See *Parker v. Gerrard, Bart.*, Ambl. 236. *Warner v. Baynes*, Ambl. 589. The

habit of the Court is now to divide the expense of the conveyance and partition, in proportion to the interests. *Agar v. Fairfax*, 17 Ves. 533. *Baring v. Nash*, 1 Ves. & Bea. 554. There

is no objection to a partition, from the minuteness of the interest of one of the parties, or the inconvenience or reluctance of the other tenants in common; but where the title is under suspicious circumstances, a court of equity may well pause in directing partitions. A partition may be demanded during a tenancy for life; and also during tenancy for years. *Baring v. Nash, supra*.

ture of settlement, with their respective rights, members, and appurtenances, To have and to hold the same (subject to the uses by the same subject to indenture thereof limited, antecedently to the <sup>certain uses</sup> previously said limitation, to my own right heirs) unto the <sup>limited.</sup> said [trustees], their heirs and assigns, To the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoies, and declarations hereinafter expressed and declared concerning the same, that is to say: As to one moiety of the <sup>As to one</sup> said manors and other hereditaments, to the <sup>moiety,</sup> use of A. B. of, &c. his executors, administrators, <sup>to the use of</sup> a trustee forutors, and assigns, for the term of 99 years, (to <sup>99 years,</sup> be computed from the expiration or failure of the uses, by the same indenture limited, antecedently to the said limitation, to my own right heirs,) and thenceforth next ensuing, if my daughter *Jane* shall so long live; in trust, to <sup>to secure</sup> pay and apply the yearly rents, issues, and <sup>rents to</sup> profits of the said moiety, as the same shall become due, into the proper hands of my said daughter *Jane*, for her sole, separate, and peculiar use and benefit, and upon her sole receipt for the same; but without liberty to dispose of the same in any mode of anticipation. [See note "Trusts for feme covert as to person-

*Wells v. Slade*, 6 Ves. 498. *Turner v. Morgan*, 8 Ves. 143. *Lord Brook v. Lord Hertford*, 2 P. Wms. 518. *Attorney-General v. Hamilton*, 1 Madd. 214; and see *Calmady v. Calmady*, 2 Ves. jun. 570.

*alty," &c.] And immediately after the expiration or sooner determination of the said term of 99 years, and in the meantime subject thereto, To the use of the said *Jane* and her assigns, during her life, without impeachment of waste:*

*subject thereto, to the use of such daughter for life,*  
*remainder to the use of trustees, to preserve contingent remainders; after decease of such daughter, to the use of children, as such daughter shall appoint.*

*To the use of the said [trustees], their heirs and assigns, during the life of the said *Jane*; In trust for her, and to preserve the contingent remainders hereinafter limited:*

*And after her decease, To the use of all and every, or such one or more exclusively of the others or other of her children or remoter issue for such estates, in such shares, charged with such annual or other sums of money for their or any of their benefit, and with such remainders or limitations over between or amongst them or any of them, as the said *Jane* shall, whether married or single, appoint by some writing under her hand\*: And in default of*

*Feme covert.* \* A married woman may by will dispose of real estate by way of power over an use, and she may execute such power whether appendant in gross or simply collateral. *Peacock v. Monk*, 2 Ves. 190.

Lord Hardwicke laid down three principles, by which all cases of wills by femes covert under powers are to be governed: First, That such is not a proper will, but a writing in nature of a will, in virtue of a power reserved to the feme covert; and therefore, whoever takes under the same, takes by virtue of the execution of the power, and by the power coupled with the writing, and as if the limitation in that writing of appointment had been contained in the deed creating the power; for they take from the author of the power. But notwithstanding that, though

such appointment, To the use of all and every <sup>To the use  
of children  
of such</sup> the children or child born or to be born to the

such writing is not a proper will, it has the effect and consequence of a will, to three intents: 1st. the words are to have the like construction as if it was a proper will; for otherwise there would be a strange confusion in the construction of writings, if they were to have one construction where proper wills, and another where improper; the words therefore of such writings are to receive the same liberal and beneficial construction as the words in a proper will. Secondly, That such writing, in nature of a will, though not a proper will, is ambulatory until the death of the testatrix; and, therefore, though the party taking thereby, takes by virtue of and under the power, yet, notwithstanding that, such appointee must survive the testatrix before he can take. Thirdly, That they can take only from the time of the death of the testatrix, that is, the consummation of the writing; and then they do not take as from the time of the power; but the operation and effect are only to take and vest the estate from the time of the consummation of the act by the death of the testatrix. So far such writing has the property of a will. *Southby v. Stonchouse*, 2 Ves. 610. *Et vide Hearle v. Greenbank*, 1 Ves. 298. 3 Atk. 711. *Grigby v. Cox*, 1 Ves. 517.

In the case of *Peacock v. Monk*, *supra*, Lord Hardwicke made the following observations: *Agreements for settling estates to the separate use of the wife on marriage, are very frequent; relating both to real and personal estate. As to personalty, undoubtedly, where there is an agreement between husband and wife before marriage, that the wife shall have to her separate use either the whole or particular parts, she may dispose of it by an act in her life, or by will: she may do it by either, though nothing is said of the manner of disposing of it. But it is very different as to real estate; for her real estate will descend to her heir at law, and that more or less beneficially; for the husband may be tenant by courtesy, if they have issue; otherwise not; but still it descends to her heir at law. Undoubtedly, on her marriage, a woman may take such a method, that she may dispose of that real estate from going to her heir at law; that is, she may do it without a fine; but I doubt whether it can be done, except either by way of trust,*

daughter, as said *Jane*, to be equally divided between or tenants in common in amongst them, if more than one, as tenants in

Feme covert. *or of power over an use.* In the first instance, suppose a woman, having a real estate before marriage, and either before or after marriage, by a proper conveyance, (if after the marriage it must be by fine), conveys that to trustees, in trust for herself during her coverture, for her separate use; and afterwards that it shall be in trust for such person as she shall by any writing under her hand and seal, or in nature of a will, appoint; and in default of appointment, to her heirs. She marries, and makes such appointment as that described; that is a good declaration of the trust, and this court would support that trust, and it could never be a conveyance to the heir at law, against this direction to the trustees. So it may be done by her, by way of power over an use; as if she conveyed the estate to the use of herself for life; remainder to the use of such persons as she by any writing, &c. should appoint; and in default of appointment, to her own right heirs: this is a power reserved to her; and it has been determined in this court, that a feme covert can execute a power; as in *Travel v. Travel*, and *Rich v. Beaumont*, where the Lords sent a case to the King's Bench, for their opinion, (which they never did before). But can a feme covert do this so as to bar her heir by a bare agreement, without doing any thing to alter the nature of the estate? The only question that could arise would be, whether such an agreement between her and her husband would not give her a right to come into a court of equity after the marriage, to compel the husband to carry this agreement into execution, and to join with her in a fine to settle the estate, either on such trusts, or to such and such uses? And if it is such an agreement as the court would decree to be farther carried into execution by a proper conveyance, then the question may be, whether her heir at law is not to be bound by the consequences of that agreement? That is the only way by which it could be brought in. *Et vide Earl of Kinnoul v. Money*, 3 Swanst. 202 (n).

In *Wright v. Cadogan*, 1 Bro. Parl. Ca. 486, by articles before marriage, the intended husband covenanted that he would execute all such acts and conveyances as should be necessary for vesting any estate which might descend to his wife, in such per-

common in tail, with cross remainders between tail, with or amongst them in tail: And if there shall be <sup>cross re-</sup>  
mainders

sons as his wife should name, in trust for her sole and separate use; and to be subject to such disposition as she should make thereof, by any deed or writing under her hand and seal, or by her last will and testament. The wife became entitled to a trust estate in some lands, which she devised by her will. It was decreed by Lerd Northington, that the power was well created, and that the will of the wife was a good execution of it. On appeal to the House of Lords, this decree was affirmed; and on the true ground, as appears by subsequent decisions; namely, that as the husband by the articles actually covenanted to do all necessary acts to enable his wife to make any such disposition or appointment of her estate as she should think fit, either by deed or will, he was bound in equity to do all necessary acts for authenticating or establishing any deed or will which she should make. In pursuance of the last mentioned principle, the following case was decided, where a husband, before marriage, entered into a bond, with a condition, empowering his wife to dispose of her freehold estate by deed or will, notwithstanding her coverture; but no settlement appeared to have been made upon the occasion, nor any other transaction passed except the above-mentioned bond. The wife afterwards by will gave her estate to her younger children in fee. Lord Chancellor Caunden said, the agreement was made on marriage, and the wife might have compelled the husband to join with her in a fine. And that though that case, and the case of *Wright v. Lord Cadogan*, differ, in respect that the wife had only an equitable interest in the one and the legal interest in the other, yet the principle of determination is the same in both. Equity follows the law; and as the court decreed performance of the agreement in *Wright v. Lord Cadogan*, which was a trust interest, it will do so in this, which is a legal interest. *Rippon v. Dawding*, Ambl. 565. *Hodsdon v. Lloyd*, 2 Br. C. C. 534.

If feme covert be seised of lands in fee, she cannot, at common law, devise the same to her husband; Co. Litt. 112 b, because at the time of making her will she can have no power (being

between or a failure of issue of all the children save one; amongst them in tail, or if the said *Jane* shall have but one such child, To the use of the remaining or only child in tail: And in default of such issue, To the use of C. D. his executors, administrators, and assigns, for the term of 99 years, to be computed from the decease of the said *Jane*, and such failure of issue of her body as hereinbefore is mentioned, and thenceforth next ensuing, if my daughter *Catherine* shall so long live, upon the like trusts, for the separate use and benefit of the said *Catherine*, and subject thereto, with the like remainders or limitations over, To the use and for the benefit of the

*sub potestate viri*) to devise the same, and the law would intend that it was done by coercion of her husband. But, in the execution of a power, she may appoint to her husband, because the estate will arise out of the original seisin; and he takes under the original deed.

With respect to the question, whether, when a feme sole has made a will, and afterwards marries, such subsequent marriage operates as a revocation of the will? The marriage must have that operation, because a will supposes a disposing power at the time in the person making it; and that it shall be always afterwards subject to the control of such person; but that is not the case with a woman after coverture, for when she enters into that engagement, she gives up the right to her own property. It may be a great doubt whether it could have been agreed that the marriage should not revoke the will, even if there had been words for that purpose; because it would be a stipulation in direct opposition to a positive rule of law; for if the agreement referred to the will then in existence, still the will would want a necessary ingredient, namely, a disposing power by the party making it during the whole time. *Doe v. Staple*, 2 T. R. 662. *Hodsdon v. Lloyd*, 2 Br. C. C. 543.

said *Catherine* and her issue, and for preserving and her contingent remainders: And subject to the like <sup>issue.</sup>  
 power of appointment as I have hereinbefore given or devised to or for the benefit of the said *Jane* and her issue: And for default of such issue, To the use of the heirs of the body to the use of of my late father: And for default of such issue, To the use of my own right heirs: And as to the other moiety of the said manors and other hereditaments, To the use of the said A. B. his executors, administrators, and assigns, for the term of 99 years, to be computed from the expiration or failure of the uses by the hereinbefore recited indenture limited antecedently to the limitation to my own right heirs, and thenceforth next ensuing, if the said *Catherine* shall so long live, Upon the like trusts, for the separate use and benefit of the said *Catherine*, and subject thereto, with the like remainders or limitations over, To the use and for the benefit of the said *Catherine* and her issue, and for preserving contingent remainders: And subject to the like power of appointment as I have hereinbefore given or devised, to and for her and their benefit, of or in the first hereinbefore mentioned moiety: And for default of such issue, To the use of the said C. D. his executors, administrators, and assigns, for the term of 99 years, to be computed from the decease of the said *Catherine*

*rine*, and such failure of issue of her body as last hereinbefore is mentioned, and thenceforth next ensuing, if the said *Jane* shall so long live, upon the like trusts for the separate use and benefit of the said *Jane*, and subject thereto; with the like remainders and limitations over, To the use and for the benefit of the said *Jane* and her issue, and for preserving contingent remainders, and subject to the like power of appointment as I have hereinbefore given and devised for her or their benefit of and in the said first mentioned moiety: And in default of such issue of my said daughter *Jane*, To the use of the heirs of the body of my late father: And in default of such issue, To the use of my own right heirs.

Devised to an  
infant.

**XCII.** I give and devise all my freehold and all my copyhold or customary messuages, farms, lands, tenements and hereditaments, whatsoever and wheresoever, unto A. B. son of G. B. of &c. his heirs and assigns for ever. But in case the said A. B. shall depart this life, before he shall attain the age of twenty-one years, and without leaving lawful issue him surviving, then I give and devise the said messuages, farms, lands, tenements, and hereditaments, unto C. B. another son of the said G. B. his heirs and assigns for ever. [See note, “Settlement.” (8)].

Executory  
devise over.

Deive of all  
estates of  
testator.

**XCIII.** I give and devise all those the manors, mansion house, cottages, lands, tenements, and all and singular other the freehold and copyhold hereditaments, of which I or any person or persons in trust for me, am, are, or is seised, or shall be seised, at the time of my decease, (including the estate which I have contracted to purchase from Mr. J. D. of, &c.) or which, in exercise of any special power, I am authorised or enabled to appoint by this my will; and in respect to my copyhold estates, whether the same shall or shall not be surrendered to the use of my will, with the rights, royalties, members, and appurtenances, (except my remainder or reversion in the estates comprised in the settlement executed on the marriage of my son ; And except my messuages, lands, tenements, and hereditaments, at , with the appurtenances; And except the estates vested in me upon any trusts whatsoever, or by way of mortgage, with their rights, members, and appurtenances,) unto [trustees] their heirs and assigns, To the uses, and upon the trusts hereinafter expressed and contained, of and concerning the same; (that is to say): To the use of my son A. B. and his assigns, during his life, without impeachment of waste; And after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of the said [trustees] and their heirs, to the use of during the life of the said A. B. In trust for preserve

(Except reversion in certain estates,  
and except certain other estates:  
And except trust and mortgaged estates.)

contingent him, and by the usual ways and means, to pre-  
remainders. serve the contingent remainders hereinafter de-

Remainder vised; And after the decease of the said A. B.  
to the use of to the use of my grandson A. B., the eldest son  
grandson for life.

life, without impeachment of waste; and after  
the determination of that estate by forfeiture,

Remainder or otherwise, in his lifetime, to the use of the  
to the use of said [trustees] and their heirs, during the life  
trustees to of the said A. B. my grandson, In trust for him,  
preserve contingent by the usual ways and means, to preserve the  
remainders. contingent remainders hereinafter devised; And

Remainder after the decease of the said A. B. my grand-  
to the use of son, to the use of the first and every other son  
first and of his body, severally and successively, accord-  
every other son of his ing to their respective seniorities in tail male;  
body suc- sively, in tail male. And for default of such issue, to the use of C.

Remainder B. the second and only other son of my said  
to the use son the said A. B. and his assigns, during his  
of second grandson for life, without impeachment of waste. And after

the determination of that estate, by forfeiture  
or otherwise in his lifetime, to the use of the

Remainder said [trustees], and their heirs, during the life  
to the use of of the said C. B., in trust for him, and by the  
trustees to usual ways and means, to preserve the contin-  
preserve gent remainders hereinafter devised; And after  
contingent the decease of the said C. B. to the use of the

Remainder first and every other son of his body, severally  
to the use of and successively, according to their respective  
first and every other son of his body succes- seniorities, in tail male; And for default of such  
son of his body success- issue, to the use of every other son hereafter  
sively, in tail male.

to be born to the said A. B. my eldest son, Remainder severally and successively, according to their respective seniorities, in tail male: and for default of such issue, to the use of every other son, to be born to the testator successively in waste. And after the determination of that tail male, estate by forfeiture or otherwise in his lifetime, to the use of to the use of the said [trustees], and their heirs, during the life of the said T. B., In trust for him, and by the usual ways and means, to preserve the contingent remainders hereinafter devised. And after the decease of the said T. B. to the use of W. B. (the only son of the said T. B.) and his assigns, during his life, without impeachment of waste. And after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of the said trustees, and their heirs, during the life of the said W. B. and by the usual ways and means, to preserve the contingent remainders hereinafter devised. And after the decease of the said W. B. to the use of the first and every other son of the said W. B. severally and successively, according to their respective seniorities, in tail male; And for default of such issue, to the use of every other son hereafter to be born to my said son, the said T. B. severally and successively, according to their respective seniorities, in tail male; and for default of such issue, to the use of my third son C. B. during his life, without impeachment of waste; and after the

Remainder to the use of  
son to be born to the testator for life.  
Remainder to the use of  
trustees to preserve  
Remainder to the use of  
son to be born to the testator for life.  
Remainder to the use of  
trustees to preserve  
Remainder to the use of  
son to be born to the testator for life.  
Remainder to the use of  
son to be born to the testator for life.

to the use of determination of that estate by forfeiture or third son, otherwise in the lifetime of the said C. B., to for life.

Remainder to the use of trustees, to the use of the said [trustees] and their heirs, during the life of the said C. B. In trust for preserve him, and by the usual ways and means, to pre-contingent remainders. serve the contingent remainders hereinafter de-

vised. And after the decease of the said C. B., to the use of first and every other son of the said C. B. severally and successively, according to their respective seniorities, in tail sive- sively, in male; And for default of such issue, to the

uses hereinafter mentioned; that is to say, I give and devise the said estates comprised in the said settlement, executed on the marriage of my said son A. B., and also the several es- tates hereinbefore devised, with their respec- tive appurtenances, but subject respectively as hereinbefore is mentioned, To the use of the

said [trustees], their heirs and assigns; In trust during the lives of my daughters *Jane*, the wife of A. K., &c. and *Mary B.* and the life of the survivor of them, to pay the rents, issues, and profits of the said manors and other here- ditaments to my said daughters, and the sur- vivor of them, for their respective separate use and benefit, independently and exclusively of any husband to whom they may be respectively married, and without being in anywise subject or liable to the debts, demands, or en- gagements of their respective husbands; and the receipts of my said daughters, notwith-

To the use of trustees in fee; In trust dur- ing lives of two daugh- ters, and of survivor, to pay rents to them for their sepa- rate use.

standing their respective marriage, shall be effectual discharges for so much of the said rents, issues, and profits, as shall be therein mentioned and acknowledged to be received. But my said daughters are not to be at liberty to charge, assign, or otherwise dispose of the said rents, issues, and profits, or any part of the same, in any mode of anticipation. And after the decease of the survivor of my said daughters, I direct that the said [trustees] and the survivor of them, and the heirs and assigns of such survivor, shall sell the said manors and other hereditaments, by public auction or private contract, in one lot, or in several parcels, for such price or prices as to them or him shall seem reasonable, and with full power and authority to purchase in the same at any public auction, without liability for any loss which may be occasioned thereby. And my will is, that the said [trustees], and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, shall stand and be possessed of, and interested in the money arising from such sale or sales as aforesaid, In trust for all and every the children and child of my said two daughters, and all and every the daughters and daughter of my said three sons, who shall attain the age of twenty-one years, and the issue of such of them as shall depart this life under that age, leaving issue at his,

But daughters not to charge or dispose of same.  
After decease of survivor, trustees to sell the estates.  
To stand possessed of purchase money,  
In trust for all the children of said daughters, and all the daughters of said sons,

her, or their decease or respective deceases, or (in respect to the issue of sons) born in due time afterwards, and their respective executors, administrators, and assigns, to be divided between or among the said children of my said two daughters, and the daughters of my said sons, if more than one, in equal shares, *per capita*, and not *per stirpes*. And if there shall

in equal  
shares.

If only one child, for that only child. be but one such child of my said daughters and sons, then in trust for that one child, his or her executors, administrators, and assigns;

In default of such issue, In trust for next of kin, exclusively, of wife. and if there shall be no such child, the same shall be in trust for the persons who, at the time of my decease, would, under the statutes for the distribution of the estates of intestates

be entitled to my personal estate (exclusively of a surviving wife), and to be divided between or among such persons, if more than one, in the shares in which my said personal estate would, in that event, be devisable between or

If estates become saleable, pre-  
sumptive share to ac-  
cumulate. among them. And I hereby declare my will to be, that if my said estates shall become saleable under the trusts aforesaid, then during the minority of any person who, under the trusts hereinbefore expressed and contained, shall be presumptively entitled to the money arising from the said sale or sales, or any parts or shares of the same, the said [*trustees*], and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, shall invest the amount of such person's pre-

sumptive interest or share of or in the money arising from the said sale or sales, in the purchase of parliamentary stocks or public funds of Great Britain, or at interest on government or real securities in England; and from time to time alter and vary the said trust monies, stocks, funds, and securities, for or into other stocks, funds, or securities of the like nature, and accumulate the interest, dividends, and annual produce of the same for the benefit of the person or persons ultimately becoming entitled to the fund from which such accumulations shall have proceeded, and to be considered as part of the same. Provided always, and If said two daughters, or the survivor of them, shall at any time, while they or she shall be entitled, as estates to be sold, to the rents, issues, and profits of the said manors and other hereditaments, be desirous that the same shall be sold, and shall signify such desire by writing under their respective hands, then and in that case the said [trustees], and the survivor of them, and the heirs and assigns of such survivor, shall sell the same in manner hereinbefore mentioned, and lay out and invest the money arising from the sale thereof in their or his names or name, in the purchase of parliamentary stocks or public funds of Great Britain, or at interest on government or real securities in England, and from time to time

sell the same, and invest the money in the funds, &c.

alter and vary the same as they or he shall think fit. And during the lives of my said daughters, or the survivor of them, pay the interest, dividends, and annual produce of the same trust monies, stocks, funds, and securities, into their proper hands, and for their separate use and benefit, in such manner as is hereinbefore directed respecting the payment of the said rents, issues, and profits of the said manors and other hereditaments, for the respective separate use of my said daughters.

and after  
decease of  
survivor of  
daughters,  
to stand pos-  
sessed of  
principal  
money:

And that after the decease of the survivor of my said daughters, the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, shall stand and be possessed of and interested in the money arising from the said sale or sales, and the stocks, funds, and securities upon which the same shall be invested, upon the trusts hereinbefore expressed and contained of and concerning the monies arising from the said sale, or sales. And I further declare my will and mind to be, that it shall be lawful for the said [*trustees*], and the survivor of them, and the heirs, and assigns of such survivor, to sign and give a receipt or receipts in writing, for the money arising from the said sale or sales, and that such receipt or receipts, shall effectually discharge the person or persons to whom the same shall be given from the money therein mentioned and acknowledged to be received,

upon the  
trusts before  
expressed.

Indemnity  
to purchas-  
ers.

and from being answerable for the misapplication, or in any wise bound to see to the application of the money therein mentioned and acknowledged to be received \*.

\* A concise statement of the law relative to those points, usually arising on a settlement by will of real estate, will be attempted in this note. But the student is referred for further information on the subject, to the clear and comprehensive history of the progress of settlements, given by Mr. Butler in his important note to Co. Litt. 290 b. sec. 5, and to the inestimable Essay of Mr. Fearne, on Contingent Remainders and Executory Devises.

The estate devised to a tenant for life is the substance of the grant, and the privilege to be without impeachment of waste of the clause is collateral, and only for the benefit of the tenant for life. "without The omission of the privilege of being without impeachment of waste, is only for the benefit of the remainder-man. Co. Litt. 219 b. Lord Nottingham, so long ago as the year 1680, in the case of *Abraham v. Bubb*, Freem. 53, observed that the law formerly was held to be, that if there were tenant for life, without impeachment of waste, this did only create an impunity in the tenant for life, although it was the express provision of the party. 4 Co. 63. But afterwards, in *Lewis Bowle's* case, 11 Co. 81, the opinion was, that these words did vest a right and interest in the tenant for life, and did give him liberty to fell and take the trees to his own use, for there is an express provision of the party; but in the case of tenant in tail, after possibility of issue extinct, that is the provision of the law only, and though in some cases *fortior est dispositio legis quam hominis*, yet that shall not be to incumber estates. But in many cases, where a person is punishable in law for committing of waste, yet this court shall enjoin him; as, where there is tenant for life, remainder in fee, the tenant for life shall be restrained from committing of waste by the injunction of this court.

If there be tenant for life without impeachment of waste, if he goeth to pull down houses, &c. to do waste maliciously, this court will restrain, although he hath express power by the act

of the party to commit waste; for this court will moderate the exercise of that power, and will restrain extravagant humorous waste, because it is *pro bono publico* to restrain it.

By a long series of cases, it is now fully established, that tenant for life without impeachment of waste, may fell timber on the estate, and convert it to his own use. But this power will not authorise him to cut down ornamental trees, or young saplings, or trees not fit to cut as timber. The court makes a distinction between thriving and unthriving timber; and will only allow tenant for life without impeachment of waste, to cut down timber in a husband-like and reasonable manner. He is also entitled to the timber of buildings blown down on the estate; he may grant leases out of his interest, without impeachment of waste, but neither he nor his lessee can maliciously waste the estate by pulling down houses, &c. Tenant for life without impeachment of waste, may also open mines on the estate. *Aston v. Aston*, 1 Ves. 263. *Marquess Downshire v. Sanderson*, 6 Ves. 110. *Day v. Merry*, 16 Ves. 375. *Strathmore v. Bowes*, 2 Bro. C. C. 88. *Tracy v. Hereford*, *Ib.* 138. 2 P. Wms. 242.

Where the clause, without impeachment of waste, is restrained by the words "except voluntary waste," the tenant is punishable for wilful waste, and has no interest in the timber otherwise than the mast and shade, and necessary botes. *Per Lord Hardwicke*. *Dick.* 188.

If equitable waste has been committed, which never could have been authorised, the court has jurisdiction to make the representatives of the party committing such waste accountable. *Bishop of Winchester v. Knight*, 1 P. Wms. 407. *Marquis of Lansdowne v. Marchioness of Lansdowne*, 1 Madd. 116.

Where a person having the next estate of inheritance does not appear, and there are contingent remainders, then the trustees to preserve contingent remainders are the proper persons to apply to the court for an injunction to restrain waste, and for an account of the produce. *Garth v. Cotton*, 1 Dick. 183. The produce of waste is laid up for the benefit of the contingent remainder-men. *Williams v. Duchess of Bolton*, 3 P. Wms. 268, n.

If the doctrine respecting waste were to be considered as *res integra*, the best course would be, to require testators to say what their own injunctions should be, rather than leave them

at liberty to give legal rights, the court being called on to determine how the parties having those legal rights may be said to execute them equitably. *Per Lord Eldon in Burgess v. Lambe, 16 Ves. 185.*

Remainders are either vested or contingent. Vested remainders, or remainders executed, are those by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent; as if A. be tenant for years, remainder to B. in fee; hereby B.'s remainder is vested, which nothing can defeat or set aside. So, where an estate is conveyed to A. for life, remainder to B. in tail, remainder to C. in tail, with any indefinite number of other remainders over in tail to persons in *esse*, all these remainders are vested. The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate *in praesenti*, though it is not to take effect in possession, with primary profits, till a future period; and such an estate may be transferred, aliened, and charged much in the same manner as an estate in possession. It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life or in tail is and must be liable, as the remainder-man may die, or die without issue, before the death of the tenant for life. The *present capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a *vested remainder* from one that is contingent. *Fearne, 215.*

The legal subjection of contingent remainders to the power of Limitation the tenant of the preceding particular estate of freehold on to trustees which they depend, and also the introduction of fines and re- to preserve coveries, (by which entails are barrable by the first tenant in contingent tail), have occasioned the resort to what are styled, estates to preserve contingent remainders. The limitations to trustees to support contingent remainders took rise from *Chudleigh's case, 1 Co. 120.* and *Archer's case, 1 Co. 66.* These estates are limitations of the use, or legal estate, from and after the determination of the estate of tenant for life, by forfeiture or otherwise,

in his life-time, to some trustees, &c. during his life, in trust, to preserve the contingent remainders, expectant on his decease, from being destroyed, to which they would otherwise be liable from his surrender, forfeiture, or tortious alienation. Subject to that trust the trustees are to hold in trust for the tenant for life and his assigns. The legal estate thus limited to the trustees during the life of tenant for life, is a good remainder vested in them, under which they will have such a right of entry in case of any forfeiture or tortious alienation by the tenant for life, as will support the contingent remainders expectant on his decease. Now it seems that if such trustees to support contingent remainders join in a conveyance to destroy the contingent uses or remainders which they were entrusted to preserve, a court of equity will consider it a breach of trust; and in general, if the purchaser under such conveyance comes in for valuable consideration, and without notice, then will the remedy of the person claiming under the contingent remainders be against the trustees, who shall be decreed to purchase lands, with their own money, equal in value to the lands sold by them, and to hold them upon the same trusts and limitations as they held the other. But if the conveyance be with notice of the uses, whether with or without consideration, in that case the purchaser shall hold the lands subject to the former trusts. *Fearne*, 326.

A certain and indefeasible estate may be secured to an un-born child. The estate will thus be rendered unalienable till the eldest son attains 21. The father, tenant for life, (and who has therefore the immediate freehold or freehold in possession,) concurring with the eldest son, tenant in tail, may, immediately on such son's majority, suffer a recovery, and thus bar the entail and all the subsequent remainders, and acquire a new estate of freehold; and thus all danger of a perpetuity ceases; and the bounds prescribed by law to non-alienation are observed. But estates tail, from the time of the statute *de donis* until common recoveries were found out, were looked upon as perpetuities. *Scattergood v. Edge*, 12 Mod. 278. As estates tail may thus be destroyed by common recovery, the possibility that they may enure for ever can be no objection to their creation; for the power which every tenant in tail possesses of barring his estate by a fine, and barring the estate tail and remain-

ders over by a common recovery, cannot be restrained by condition, limitation, custom, recognizance, ~~statute~~, or covenant. *Taylor v. Horde*, 1 Burr. 84.

Real property may thus be rendered unalienable during the existence of a life in being, and twenty-one years after; that is, till the son of tenant for life attains his majority. From one life the courts gradually proceeded to several lives in being at the same time; for this in fact only amounted to the life of the survivor; and as it might happen that a tenant for life, to whose unborn son an estate tail was limited, might die, leaving his wife enceinte, an allowance has been made for the time of gestation of a posthumous son. Before the stat. 10 & 11 Wm. III. c. 16, it had indeed been adjudged in the court of Common Pleas, and that judgment was affirmed in K. B., that a posthumous son could not take a contingent remainder limited by will; because he was not born previously to the death of the tenant for life, that is to say, when the particular estate determined; and that therefore, as the remainder could not vest at the very instant of the determination of the particular estate, it was void. But the judgment was reversed in the House of Lords, contrary to the opinion of all the Judges. *Reeve v. Long*, Salk. 227. 3 Lev. 400. The House of Commons, in consequence of this decision, and (as it has been said) in reproof of this assumption of legislative authority in the Lords, immediately brought in the act of the 10 & 11 Wm. III. c. 16, which passed into a law. It is thereby enacted, sec. 1, "That where any estate is, or shall, by any marriage, or other settlement, be limited in remainder, to or to the use of the first or other son or sons of the body of any person lawfully begotten, with any remainder or remainders over to or to the use of any other person or persons, or in remainder to or to the use of any daughter or daughters, lawfully begotten, with any remainder or remainders to any other person or persons than any son or sons, or daughter or daughters of such person or persons, lawfully begotten or to be begotten, that shall be born after the decease of his, her, or their father, shall, by virtue of such settlement, take such estate so limited, in the same manner as if born in the life-time of the father, although there shall happen no estate to be limited to trustees after the decease of the father, to preserve the contingent

remainders to such after born son, &c. until he, she, or they come in ~~esse~~, or be ~~men~~, to take the same." The statute only mentions marriage and other settlements; and it has by some been said, that devises were designedly omitted to be expressed, from a delicacy that the authority of the judgment of the Peers might not be too openly impeached; and others say, that there is a tradition, that as the case of *Reeve v. Long* arose upon a will, the Lords considered the law to be settled by their determination in that case, and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Salkeid, in the above case of *Reeve v. Long*, p. 228, makes a quære, whether this statute extends to a devise? because the words are, "where an estate by marriage, or other settlement, is limited;" but there seems no just ground for the doubt. *Bassett v. Bassett*, 16 Dec. 1744, in Chan. 8 Vin. Abr. 87. Bull. N. P. 1056.

(4).  
As to perpe-  
tuities.

There is no method whatever of securing an estate to the grandchildren of a person who is without children at the time of the settlement of such estate; for an estate cannot be limited beyond a life or lives in being, and twenty-one years and a few months afterwards. *Robinson v. Hardcastle*, 2 Bro. Ch. Ca. 30. 2 T. R. 241. In cases where a perpetuity is attempted in a will, the Courts do not, if they can avoid it, construe the devise to be utterly void, but expound the will in such a manner as to carry the testator's intention into effect as far as the rules concerning perpetuities will allow, which is called a construction *cy-pres*. *Pit v. Jackson*, 2 Bro. C. C. 51. *Griffiths v. Harrison*, 3 Bro. C. C. 410. 4 T. R. 737. *Bristow v. Warde*, 2 Ves. Junr. 336.

(5).  
Where limi-  
tation to  
trustees to  
support con-  
tingent re-  
mainder is  
not requir-  
ed.

It is proper to observe, that where the legal estate is devised to and vested in trustees in trust, and the contingent limitations therefore become trusts only, there is no necessity for any preceding particular estate of freehold to support contingent limitations; or, in other words, there is no occasion to introduce a limitation to trustees to preserve contingent remainders, for the legal estate in the general trustees will be sufficient for the purpose; and, consequently, in such cases it is not necessary that a contingent remainder should vest by the time the preceding trust limitation expires. As, where A. devised to the use of trustees

and their heirs, in trust for B. for life; remainder to his first and other sons successively in tail; remainder to ~~the~~ future sons of C. successively for life; remainder over; B. died without issue in the testator's life-time; the contingent limitations were taken as executory devises, because no child was then born to C.; afterwards a child was born to C. and died, and a subsequent remainder-man claimed the estate, upon a supposition that all the preceding intermediate limitations which could not vest at the death of such child were destroyed; as it had been decreed that, upon the vesting of the executory devise in that child, the subsequent limitations became contingent remainders upon that executory devise: but it was held that the inheritance in the trustees was sufficient to support the intermediate contingent remainders till they should come in *esse*, although no particular estate to support, &c. was inserted; and that the estate should not vest in possession whilst an object of any preceding limitation might come in *esse*. *Fearne*, 304. *Hopkins v. Hopkins*, Ca. Temp. Talb. 44.

*Estates pur autre vie* may be devised or limited in strict settlement, by way of remainder, like estates of inheritance; and *Estates pur autre vie*.  
*(6).*  
 such as have interests in the nature of estates tail, may bar their issue and all remainders over, by alienation of the estate *pur autre vie*. Thus it is, if a person seised of an estate *pur autre vie*, devises to one (indefinitely or for life), and to the heirs of his body, or to one and his heirs, and if he dies without heirs of his body, or in general to one in such manner as would give him an estate tail in lands of inheritance, remainder over; the limitation in these instances makes no estate tail, properly so called, for all estates tail must be of inheritance; nor are these limitations executory devises; but it appears that the limitation to the heirs of the body may carry the estate to them, and a remainder over may take effect, if the person entitled, by virtue of the limitation in tail, makes no disposition of the estate. But, if no such act be done, the remainder-man will take as special occupant. The person entitled under the limitation in tail may, however, if he thinks fit, dispose of the whole, and bar as well the remainder over as his own issue. *Fearne*, 496.

In *Saltern v. Saltern*, 2 Atk. 376, Lord Hardwicke observed, that where there is a devise of a lease for years to a man, and if he die without issue, remainder over, there is no doubt but the

whole interest vests in the first taker; otherwise, if it had been a lease for lives; for there the first taker had a power over it only during his own life to have disposed of it. It appears, therefore, to be now settled beyond dispute, that where leases *pur autre vie* are limited to one in tail, he may, by lease and release, or any other conveyance proper for passing estates of freehold, bar his own issue and all remainders over, and make a complete disposition of the whole estate. *Wastneys v. Chappell*, 1 Bro. Parl. Ca. 457. *Baker v. Bayley*, 2 Vern. 225. *Low v. Burrow*, 3 P. Wms. 262. *Duke of Grafton v. Hanmer*, Ib. n. Lord Kenyon appears to have been of opinion, that such remainders over might also be barred by will. *Doe v. Luxton*, 6 T. R. 291. But in *Campbell v. Sandys*, 1 Sch. & Lcf. 295, Lord Redesdale expressed an opinion to the contrary, observing that he could find no decision which warranted Lord Kenyon's *dictum*. But an estate *pur autre vie* may be so limited to one for life as to confine his interest and power of disposition to his own life estate only; as where an estate *pur autre vie* is limited to A. for life, remainder to B. for life; there the first taker cannot bar the remainder. This was clearly held by the court in the case of *Low v. Burrow*, *supra*; for such a limitation in remainder, after a life-estate only, has no tendency to a perpetuity; and it is the same thing if the limitation be for twenty lives, all spending at the same time, since it amounts to no more than the life of the survivor of them. *Fearne*, 499—502.

(7).  
Chattel interests.

The manner of settling terms for years and personal chattels, is different; for in them no remainders can be limited, but they may be entailed by executory devise, as effectually as estates of inheritance, if it be not attempted to render them unalienable beyond the duration of lives in being, and twenty-one years after, and, perhaps, in the case of a posthumous child, a few months over; a limitation of time not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted, in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the jointure, by fine or recovery, for a longer space. *Co Litt. 20 a.n. 5.*

(8).  
as to executory devise.

The executory devise over in the text, in case A. B. shall die under the age of twenty-one, having no issue, is defeated by A. B. attaining twenty-one, or by his having issue. *Eastman v.*

*Baker*, 1 *Taunt.* 174. An executory devise is defined to be, a devise of a future interest in lands, not to take effect at the testator's death, but limited to arise and vest upon some future contingency. This is the definition commonly given of an executory devise. It comprehends, indeed, every species of an executory devise; but, at the same time, it is not confined to executory devises only, it includes every kind of contingent interest in lands given by devise. Some contingent interests by devise are contingent remainders, therefore such a definition must be considered as defective in point of precision and accuracy. An executory devise is strictly such a limitation of a future estate or interest in lands or chattels, (though, in the case of chattels personal, it is more properly an executory bequest) as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void. *Fearne's Essay*, 381.

Executory devise was not regularly admitted till about two centuries ago. The rules for circumscribing it are consequently not of earlier date; and there are not any statutes for the purpose. It is impossible, therefore, that the rules should be derived from any other source than the discretion of the judges. For general utility and public convenience, they permitted executory devise, which is such a limitation of a future estate or interest in lands or chattels, as would be contrary to the rules of limitation in conveyances at common law. An executory devise is not to take effect, like a remainder expectant, on the regular determination of the prior estate; if it were so, then the remainder taking effect would regulate the quantum of the first estate; but the very principle of executory devises and bequests is, that a contingency, if properly limited, is to arise, the effect of which is to defeat the prior estate, to interrupt it in its intended extent, to determine it; a thing that could not be done formerly. That is the whole effect of executory devises and bequests to provide for the contingencies of a family. After the fee or absolute interest has been given, it is on a certain event to be defeated and to give way, to open and let in new objects, and thus to defeat, destroy, and interrupt, and give a new course

to the prior estate. The prior estate being absolute in one event does not at all prevent its going over in another event. *Lyon v. Mitchell*, 1 Madd. 481.

Executory devises have generally been distinguished into three kinds: two relative to real property, and the third relative to personal estate only.

The first sort is where the devisor departs with the whole fee simple, but, upon some contingency, qualifies that disposition, and limits an estate on that contingency.

The second is, where the devisor, without departing with the immediate fee, gives a future estate, to arise, either upon a contingency, or at a period certain, unpreceded by, or not having the requisite connection with any immediate freehold to give it effect as a remainder. Wherefore the fee descends to the heir, till the happening of the future event, when the executory devise carries it over to the devisee.

The third sort is, where a term for years, or any personal estate, is bequeathed to one for life or otherwise; and after the decease of the devisee or legatee for life, or some other contingency or period, is given over to somebody else.

The three following cases are mentioned to illustrate the first sort of executory devise; and are instances of limitations, after a preceding vested fee simple, where the fee is not immediately disposed of, yet it is made defeasible after a contingent disposition of it has taken effect.

Where a testator devised to his son, Thomas Brown, and his heirs for ever, and if he died without issue, living William his brother, that then William his brother should have those lands to him and his heirs for ever. It was adjudged, that Thomas Brown took a vested fee simple, and that the limitation over to William was good as an executory devise, to take effect on Thomas's dying without issue in the life-time of William. *Pells v. Brown*, Cro. Jac. 590. 1 Eq. Ca. Abr. 187. So where a testator devised lands to his wife for life, remainder to C. his second son in fee, provided if D. his third son should, within three months after the wife's death, pay 500*l.* to C. his executors, &c. then he devised the lands to D. and his heirs: this was an executory devise to D. *Marks v. Marks*, 10 Mod. 420: and see *Fulmerston v. Steward*, Cro. Jac. 592. *Wellcocke v. Hammond*, 3 Co. 20.

Where a testator devised lands to his son B. in fee, and other lands to his son C. in fee, subject to a proviso, that if either of his sons should die before they should be married, or before they should attain the age of twenty-one years, and without issue of their bodies, then he gave all the lands which he had given to such of his sons who should so die, &c. unto such of his said two sons as should the other survive. It was held, that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under the age of twenty-one without issue. *Hanbury v. Cockerill*, 1 Roll. Abr. 834.

And where there is a limitation after a devise in fee simple, though the first estate be not vested, but contingent, yet if the ulterior devise be limited so as to take effect in defeasance of the estate first devised, on an event subsequent to its becoming vested, it has been held to operate as an executory devise. *Gulliver v. Wickett*, 1 Wils. 105. And see Mr. Fearne's reply to the uncertainty which the reporter of the case entertained, whether the Court determined it an executory devise, or a contingent remainder. *Fearne's Essay*, p. 397.

The following cases will illustrate the second sort of executory devise, where a preceding estate is wanting, and where the future estate is not contingent, but limited on an event certain.

A devise to B. in fee, to commence and take effect six months after the testator's death. *Clarke v. Smith*, 1 Lutw. 798.

A devise to J. S. for five years from Michaelmas then next ensuing, the remainder to C. and his heirs; testator died before Michaelmas: the limitation to C. was held good, although a freehold cannot be in expectancy. But in that case the freehold would in the meantime descend to the heir, and vest in him, and which reason, (Mr. Fearne adds), proves the limitation was allowed to operate as an executory devise, though in the report it is inaccurately called a remainder. *Pay's case*, Cro. Eliz. 878.

Again, where one devised lands to his wife till his son should come to his age of twenty-one years, and then that the son should have the land to him and his heirs, and if he should die without issue before his said age, then to his daughter, this was held a good executory devise to the daughter. 1 Eq. Abr. 188. And see *Thrustout dem. Small v. Denny*, 1 Wils. 270. The first devise of the fee being to the son, who was the heir, he would still

have taken by descent, and not by devise, so that the immediate fee must be considered as undisposed of by the will. But if such devise had been to a stranger instead of the heir, the case would have fallen properly under the first division of executory devises, where the fee is disposed of in the first instance. Fearne's Essay, 401.

The third sort of executory devise has been stated to comprise all that relates to chattels; and is where a term for years, or any personal estate, is bequeathed to one for life or otherwise, and after the decease of the devisee or legatee, or some other contingency or period, it is given over to somebody else. Such ulterior limitation was void at common law, and the whole property vested in the person to whom it was limited for life, though there was indeed a distinction taken between a bequest of the use of a personal thing, and of the thing itself. But the distinction between the bequest of the use of a personal thing, and of the thing itself, to any one for life, has been for a long time completely laid aside. And in the constructive operation of such a limited gift, the restricted legatee is held only to be entitled to the use of the thing for the period expressed. (*See note "Personality," p. 135.*)

The doctrine is now fully settled, that such limitations over in a will, or by way of trust, are good. *Manning's case*, 8 Rep. 95. *Lampet's case*, 10 Rep. 46. In these cases the devise over was to a person in *esse*, and ascertained. But if the ulterior devisee be not in *esse*, or not ascertained, still the bequest over will be good. *Cotton v. Heath*, 1 Roll. Abr. 612. 1 Eq. Abr. 191. In bequests of this sort it is not in the power of the first taker to bar the bequest over; for he cannot transfer more to another than he has himself. *Hyde v. Parratt*, 1 P. Wms. 1.

In equity the like doctrine extends to chattels personal. Thus, in an early case of a devise of 500*l.* to the testator's daughter, and if she died before thirty years of age, and unmarried, then over. She received the money, and died before the time. It was resolved in equity, that her executor was chargeable, as possessed in trust for the legatees over. This indeed was not the case of a devise to one for life, or a particular period, and afterwards to another, but a conditional new disposition of the property, upon a particular contingency. Fearne's Essay, 404.

Personalty was bequeathed by will to the testator's son absolutely; and by codicil the testator "requested that such right be only for the term of his own and his wife's natural lives, provided there was no issue, and that at their decease it should become a part of, and fall into the rest and residuc." It was held, that the will and codicil, taken together, gave the personal estate in the first instance absolutely to the son, with a good limitation over, by way of executory devise, at the death of the survivor of himself and his wife, if there were no issue then living. The failure of issue was not a general failure of issue, but was plainly confined to the death of the survivor, by the direction that the share of the son was to become part of the rest and residue, at their death. *Rackstraw v. Vile*, 1 Sim. & Stu. 604.

With regard to executory devises in general, and as to their general qualities, and the bounds of restrictions within which the law confines such limitations:—

In the first place it is a rule, that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the devise can-estate out of which, or after which, it is limited. Yet it may be destroyed. (9).  
 Executory observed, that when, in lands of inheritance, an estate-tail is first limited, and then an executory or conditional limitation is made upon that estate, a recovery suffered by the tenant in tail, before the event or condition happens on which the ulterior limitation was to arise, will bar the interest under the executory devise. *Nichols v. Sheffield*, 2 Bro. Ch. Ca. 215. It is the same in respect to collateral conditions subsequent, and limitations. But a common recovery hath this operation only when suffered by tenant in tail; for the recovery by tenant in fee will not bar an executory estate, conditional limitation, or collateral limitation. The executory devise could not be affected by a recovery, because the recompence, which in the supposition of law is the ground of barring the issue in tail, and those in remainder and reversion, doth not extend to an executory devisee. Nor could an executory devised be bound by fine, because the title of the executory devisee is not through, or as privy to the immediate taker, but quite independent of him. But it is said, if the person to whom the executory devise is limited, come in as vouchee in the recovery, his possibility is thereby given up.

The person entitled to the executory estate may bar his own claim by release to the first taker in possession, or assign it in equity for a valuable consideration, or devise it by his last will.

(10).  
Limits  
ascribed to  
executory  
devise.

But executory devise being thus unbarable by recovery or otherwise, and thus uncertain as to the person of the devisee till the moment of taking effect, would, if some limit had not been prescribed, have been a shelter for perpetuity. To prevent such an abuse, the judges limited the time for the contingency on which an executory devise was to operate, holding, that unless the contingency was such, that, if it ever happened, it would necessarily happen in a limited space of time, the executory devise should be deemed illegal, and considered as a nullity; and the laws of equity also circumscribed trusts of the nature of executory devise in like manner. Hence arose the rule of confining the contingency for the springing up of future and executory estates to the compass of a life or lives in being, and twenty-one years after: including a sufficient number of months for the birth of a child *en ventre sa mère*. Hargr. 2d argument, *Thellusson's case*, p. 57; and *Fearne's Essay*, 428, *et seq.*

Therefore, every contingency which is not such, that, if it ever happens, it must necessarily be within the period so described, is too remote for an executory devise. In *Griffiths v. Vere*, 9 Ves. jun. 127, Lord Eldon said, it was well settled, that the *possibility* that an executory devise might fall within the legal limits, would not support it. The rule therefore is, that wherever an executory devise is limited to take effect after the death of a person without heirs, or without issue, subject to no other restriction, the limitation is void. As where lands are devised to A. and his heirs, and if A. die without heir, then to B., this limitation to B. is absolutely void. *Tilbury v. Barbut*, 3 Atk. 617. It is equally a consequence of the rule, that, if the failure of issue be restrained to the death of any person or persons actually living, or to any period not beyond a life or lives in being, and twenty-one years, with a few months beyond, then the contingency is good, and the executory devise has its full effect. "Perhaps, if the doctrine of executory devises was *res integræ*, and was now to be settled, it might be thought a sufficient and more just check of them to hold, that they

should be good as far as the given period; whether the contingency was too largely and widely expressed or not. But our ancestors have not left us a choice,—it having been long a fixed rule, that if the contingency is too remote, the executory devise dependent upon it shall not be merely void so far as it exceeds the line prescribed, but shall wholly fail." Hargr. Law Tracts, *Wicker v. Mitford*; and see *Duke of Norfolk's case*, 3 Ch. Ca. 1. The same rule applies to the limitation of a term, or personal estate. Thus, where A. possessed of a term of ninety-nine years, determinable upon three lives, devised the lease to his wife for life, and, after her decease, to his son for life, and if the son should die without issue, then over; the remainder over was held to be absolutely void.

But an executory devise of personalty for life to a person in *esse*, to take place after a general failure of issue of another person, is good, if it falls within the compass of ever so many lives in being at the same time. *Hodgeson v. Bussey*, 2 Atk. 89. *Beauchler v. Dormer*, 2 Atk. 309. *Trafford v. Boehm*, 3 Atk. 439.

Again, it is a general rule, that if one limitation is taken to be executory, all subsequent limitations must be so likewise. And it is grounded on these reasons, that every executory devise is either the limitation of an estate after the fee has been already disposed of (and consequently every limitation subsequent to the first executory devise must also be executory), or else it is a freehold to commence *in futuro* (and therefore no freehold can vest in possession before the time appointed for such limitation to take effect). But notwithstanding this last mentioned rule, a preceding executory limitation may be uncertain and contingent, when a subsequent limitation, though it be to take effect in future, may not be uncertain or conditional, but may be so limited as to take effect either in default of the preceding limitation taking effect, or by way of remainder after it, if that should take effect, as in the case of *Brownsword v. Edwards*, 2 Ves. 242. A devise to two trustees and their heirs, to receive the rents till B. should attain twenty-one, and if B. should attain twenty-one, or have issue, then to B. and the heirs of his body; but if B. should happen to die before twenty-one, and

without issue, remainder over. B. attained twenty-one, and afterwards died without issue. It was held, that the remainder over should take effect upon the apparent intent of the testator, that it should take place either in default of B.'s attaining twenty-one, or on his dying without issue. Here the first devise was in tail; had the devise been to B. in fee, the same construction would have prevailed as in the case of *Collinson v. Wright*, 1 Sid. 148; where the devise was to B. the son and heir of the testator, and if he died before twenty-one, and without issue of his body then living, the remainder over. B. survived twenty-one; and it was held he had a fee simple immediately, and that the estate tail was to arise upon a contingency which never happened, as he attained twenty-one. And likewise in a case (1 Eq. Abr. 188) where the testator devised land to his wife till his son came to his age of twenty-one years, and then that his son should have the land to him and his heirs, and if he died without issue, before his said age, then to his daughter and her heirs; it was held to be an executory devise to the daughter, if the contingency happened; and that in the meantime the fee descended to the son; and if he attained twenty-one, though he afterwards died without issue, or if he should leave issue, though he died before twenty-one, yet the daughter was not to have the lands, because he was to die without issue, and before twenty-one, to entitle her.

(11).  
 Distinction between re-  
 mainder and  
 executory  
 devise. Wherever an estate is devised to a person and his heirs, with a limitation over in default of issue, it is construed to be an estate tail, and the limitation over is a remainder, to take effect on the determination of the estate tail. But if the limitation over be directed to take place on an event which may happen during the continuance of the estate tail, it is an executory devise; for it cannot be a remainder, because the event on which a remainder is limited must not operate so as to abridge or determine the particular estate. So that in the case of *Pells v. Brown, supra*, if the words "living William his brother," had been omitted, it would clearly have been an estate tail in Thomas, with a remainder over to William, to take effect on the expiration of the preceding estate tail. It follows, that where there is a devise over

after a preceding devise to a person and his heirs, if there be any words in the will by which the first devise can be restrained to mean heirs of the body only, the first estate will be construed to be an estate tail, and the devise over a remainder. A devise to S. S. her heirs and assigns for ever, but if she shall happen to die, leaving no child or children, lawful issue of her body, "living at the time of her death," then to F. B. and his heirs. It was held, that the devise in fee to S. S. was not restrained by the subsequent words to an estate tail, and that the devise over to F. B. was a good executory devise. *Doe dem. Barnfield v. Wetton*, 2 Bos. & Pull. 324.

All limitations over after an executory devise of the whole interest, may be good as alternatives, if no one of the preceding executory limitations happens to vest; but when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested. Fearne's Essay, 517. *Higgins v. Dowler*, 1 P. Wms. 98. *Stanley v. Leigh*, 2 P. Wms. 686. *Beard v. Westcott*, 5 Taunt 393. It is also a rule, that wherever a devise may be construed a contingent remainder, it shall never be considered as an executory devise. But when a preceding freehold has once vested, it seems no subsequent accident will make a contingent remainder operate as an executory devise. *Hopkins v. Hopkins*, Ca. Temp. Talb. 44. 1 Ves. 267. 1 Atk. 581. But where the freehold, upon which the contingent limitation depends, becomes, by the death of the first devisee in the testator's life-time, incapable of taking effect, then the subsequent limitation, if the contingency has not happened, shall enure as an executory devise, rather than fail for want of that preceding freehold, which had never taken effect. Fearne's Essay, 526.

The foregoing very imperfect sketch of the learning of executory devise has been chiefly extracted from Mr. Fearne's elaborate work, to which the student is referred. The object of the preceding note is merely to serve as a guide to the correct expression of devises.

"Words of limitation, and words of purchase," it must be As to the owned, have been very good clients in Westminster Hall. Their rule in *Shelby's case*. (12).

pretensions are generally left so very vague and ill defined, that one rarely knows in favour of which to decide. 1 Eunomus, 143.

(13). **Explanation of the rule in Shelly's case.** According to the celebrated rule in *Shelly's* case, whosoever the ancestor taketh any estate of freehold, a limitation after, in the same conveyance, to any of his heirs, are words of limitation and not of purchase, although in words it be limited by way of remainder, Co. Litt. 376 b; or in other words when the ancestor, by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, an estate is limited either mediately or immediately to his heirs in fee, or in tail, the words "the heirs" are words of limitation of the estate, and not words of purchase. 1 Co. 104. The remainder so limited is immediately executed in possession, in the ancestor so taking the freehold, and therefore is not contingent or in abeyance.

The circumstances commonly relied on, as shewing such intention, and as furnishing matter for argument against the application of the rule, are, the use of the word *issue*, or an express estate for life being given to the ancestor, or a clause that the estate shall be without impeachment of waste, a limitation to trustees to preserve contingent remainders, or a direction that the first taker shall not have power to bar the entail. *Blackburn v. Stables*, 2 Ves. & Bea. 367. However, the doctrine respecting this celebrated rule is now finally settled, and it has been thus concisely stated: neither an intent manifested by the testator to give only an estate for life, nor the interposition of trustees to preserve contingent remainders, nor mere words of condition describing the order of succession in which the devises are to take place, nor the introduction of powers of jointuring or of liberty to commit waste, are of themselves sufficient to vary the technical sense of the words used. It must plainly appear that the testator did not mean to give such an estate as would pass under the words used, unless controlled by such apparent intent. *Poole v. Poole*, 3 Bos. & Pull. 620.

(14). **Construction of the testator's intention.**

Mr. Hargrave, (Law Tract, 575) in adverting to such construction, observes, that when it is once settled that the donor or testator has used words of inheritance, according to their legal import; has applied them intentionally to comprise the whole line of heirs to the tenant for life; and has really made him the

*terminus* or ancestor, by reference to whom the succession is to be regulated, then it will appear that being considered according to those rules of policy from which it originated, it is perfectly immaterial whether the testator meant to avoid the rule or not, and that to apply it, and to declare the words of inheritance to be words of limitation vesting an inheritance in the tenant for life, as the ancestor and *terminus* to the heirs, is a mere matter of course; that on the other hand, if it be decided, that the testator or donor did not mean by the words of inheritance, after the estate for life, to use such words in their full and proper sense, nor to involve the whole line of heirs to the tenant for life, and include the whole of his inheritable blood, and make him the ancestor or *terminus* for the heirs, but intended to use the word "heirs" in a limited, restrictive, and untechnical sense, and to point at such individual person as should be the heir, &c. of the tenant for life, at his decease; and to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork for a succession of heirs, and constitute him or her the ancestor, *terminus*, and stock for the succession to take its course from; in every one of these cases the premises are wanting, upon which only the rule in *Shelly's* case interposes its authority, and that rule becomes quite extraneous matter. The previous inquiry, therefore, will be, whether by a remainder to the heirs, either general or special, of a preceding tenant for life, it is the meaning of the instrument to include the whole of his inheritable blood, the whole line of his heirs, or to design only certain individual persons, answering to the description of heirs at his death. If the former is the sense, the rule always applies, and by vesting the remainder in the tenant for life, forces it to operate by limitation, even though the instrument should contradictorily and inconsistently add, in express terms, that the remainder should operate as a contingent one, and enure so as to make the heirs purchasers; if the latter sense is adopted, the rule is invariably foreign to the case, and the remainder consequently is contingent till the death of the tenant for life, upon which event his heir takes it by purchase. See also *Roe dem. Dodson v. Grew*, 2 Wils. 322. *Jones v. Morgan*, 1 Bro. Ch. Ca. 206.

(15). It is a great and fundamental maxim, upon which the construction of every devise must depend, that the intention of the testator shall be fully and punctually observed, so far as the same is consistent with the established rules of law, and no farther. But if it does not appear by express words, or by necessary implication, that the intention of the testator was, that his words should operate contrary to their technical and legal import, the legal operation of the words must take effect. Mr. Fearne remarks, in his *Essay on Cont. Rem. and Exec. Dev.* 186, that cases, as well as principles, tell us the controlling rule of construction in wills is the intention expressed or clearly implied; to contradict this, would indeed be a mockery, a denial of the import of the word "will." On this broad ground some have driven the rule in question to a distance that would in effect reduce it to no rule at all, by subjecting it to the control of any expression not perfectly reconcileable with a positive intention of its admission, whilst others have, with a rigid degree of legal sternness, insisted on an inflexible adherence to the rule, without regard to any implicative contravention of its effects. All the cases (said Mr. Justice Blackstone, in his celebrated argument in *Perkin and Blake*), that had occurred from the statute of wills to that time, (a period of above two centuries), in which *heirs of the body* had been construed to be words of purchase, were reducible to these four heads: either where no estate of freehold was given to the ancestor; or where no estate of inheritance was given to the heir; or where other explanatory words were immediately subjoined to the former; or lastly where a new inheritance was grafted on the heirs of the body.

(16). A testator devised to R. C. for life, remainder to trustees during his life to preserve contingent remainders, remainder to the heirs of the body of R. C., remainder in like manner to D. and the heirs of his body: Lord Hardwicke observed, that this was a mere question in law, and that as there was not one case then determined, where there is an interposition of trustees to preserve contingent remainders, he would refer the question to the Judges of the court of King's Bench. The certificate of the Judges was to this effect: that by reason of the remainder interposing between the devise to R. C. for life, and the subsequent

limitation to the heirs of his body, the said R. C. took an estate for life not merged by the devise to the heirs of his body, but by that devise an *estate tail in remainder vested in the said R. C. Colson v. Colson*, 2 Atk. 246. In the case of *Hodgson v. Ambrose*, 1 Doug. 340, Lord Mansfield said, with regard to the question, whether the interposition of trustees to preserve contingent remainders shall vary the rule of law, whatever our opinion might be upon principle and authorities, if the point were new, we all think, that, since this is literally the same case with *Colson v. Colson*, and that has stood as law for so many years, it ought not now to be litigated again. It would answer no good purpose, and might produce mischief. The great object in questions of property is certainty: and if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it, than if it were to be overturned. Many estates may be enjoyed under the authority of *Colson v. Colson*, the titles to which would be shaken if the decision in that case were to be over-ruled; and the case is so generally known among conveyancers, that it is impossible there should be many held under the contrary construction, because, if there were, they would have been controverted.

Where lands were devised to G. S. and the heirs of his body, the males to be preferred before the females, and they to succeed according to their birth; and, to preserve contingent remainders from being barred during the life of the said G. S., the testator gave the estates to a trustee, and on failure of issue of G. S. he devised to his niece and the heirs of her body, and on failure of issue of the niece to his own right heirs. The court observed, the limitation to preserve contingent remainders means nothing, and shall not control the plain words; and that the reason of the rule in *Shelly's* case, that, "where one takes an estate of freehold, and after an estate is limited to the heirs male of his body, the heirs male must take by descent and not by purchase," was, to secure to the lord his fruits on descent, and had long since ceased. But it had been better if that rule had never been broken in upon. "I am not (said Lord Commissioner Wilmot) for breaking in upon it further; I cannot find any case where the words 'heirs of the body' in the plural number, and no words superadded, have been con-

sidered as words of purchase." The court declared, that G. S. was entitled to an estate tail. *Sayer v. Masterman*, Amb. 344. *Denn* dem. *Webb v. Puckley*, 5 T. R. 299. And where a testator devised to A. for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A. in tail male, according to seniority, with divers remainders over, the ultimate remainder being limited to the right heirs male of A. for ever. It was held that A. took an estate tail male in remainder, under the devise to his right heirs male for ever, which words were held to be words of limitation, and not of purchase, notwithstanding the previous limitation to the sons of A. and their issue male. *Doe* dem. *Earl of Albemarle v. Colyear*, 11 East, 548.

(17). "Heirs of the body," Mr. Fearne observes, (see Cont. Rem. 155), that the question is not, whether the words "heirs of the body" may not, under &c. whether certain circumstances, be taken as words of purchase, but whether those words, standing clear of any further words of limitation, perfect, independent, and unexplained, and preceded by a limitation of the legal freehold to the ancestor in the same will, have ever been construed words of purchase. See *Doe* dem. *Blandford v. Applin*, 4 T. R. 82. *Doe* dem. *Chandler v. Smith*, 7 T. R. 531. *Doe* dem. *Cock v. Cooper*, 1 East, 229. *Pierson v. Vickers*, 548; "all which cases" Mr. Butler observes, in his note on Fearne's Essay, p. 203, "deserve particular mention, as in all of them, there were strong expressions, indicating the testator's intention that the estate should go in a course inconsistent with the ancestor's taking an estate of inheritance." But, although the limitation be to the heir in the singular number, the devise has been adjudged to be an estate tail. Thus a devise to A. for life, remainder to the next heir male, and, for default of such heir male, then to remain over, was an estate-tail. *Barley's case*, 1 Ventr. 230.

It will appear, by reference to the last-mentioned cases, that the words, "heirs," "heirs male of the body," "first and every other son," "issue," will be construed so as best to effectuate the testator's intention. The words, "heir," or "heir male of his body," in the singular number, are words of limitation, not of purchase, unless words of limitation are superadded,

or there is something in the context to shew that the testator did not mean to use the words in their technical sense. In *Roe dem. Dodson v. Grew, supra*, Lord Chief Justice Wilmot said, that the word "issue," in a will, is either a word of purchase or of limitation, as will best effectuate the intention of the testator; and Clive, Justice, also observed, the word "issue" is one of the most vexed words in the books; sometimes it is *nomen singulare*, sometimes plural, sometimes a word of limitation, sometimes of purchase, but it must always be construed according to intent. And Bathurst, Justice, said, "It is a rule, that where an ancestor takes an estate of freehold, if the word 'issue' in a will comes after, it is a word of limitation; where there appears a particular intent and a general intent, the general must take place. The word "issue" is generally used in a will as a word of limitation. It may be used as a word of purchase, if such appears to be the intention of the testator; but, unless such intent appears, it is usually construed as a word of limitation. See the decision of the Vice Chancellor in *Lyon v. Mitchell*, 1 Mad. 473. If the word "heirs" is used in a legal sense, the rule in *Shelly's* case must take place, though there should be express words that the heirs should take by purchase, or that the devisee should have only an estate for life. *Jones v. Morgan, supra.*

It does not seem advisable to swell the present note with a statement of the decision of the Master of the Rolls, in the case of *Bagshaw v. Spencer*, and the reversal of the decree by Lord Hardwicke, 2 Atk. 577. Mr. Fearne says, it is difficult to speak of the authority of *Bagshaw v. Spencer*, otherwise than as an anomalous case, applicable (if at all) only to its *fac simile in specie et terminis*. Cont. Rem. 136. And see *Brydges v. Brydges*, 3 Ves. junr. 120, in which case the court did not acquiesce in the decision of Lord Hardwicke, who relied much on the interposition of the trustees. But the Master of the Rolls said, the same words which create an entail in a legal estate, will, if applied to an equitable estate, create an estate-tail in that. In the case of *Bagshaw v. Spencer*, the fee was vested in the trustees; and therefore the estate in the devisee was an equitable estate. *Et vide Jones v. Morgan, supra. Goodtitle dem. Sweet v. Herring*, 1 East, 264. *Doe dem. Cooper v. Collis*, 4 T.

R. 294. *Doe dem. Phillips v. Lord Mulgrave*, 5 T. R. 320. *Lud-dington v. Kime*, 1 Lord Raymond, 203.

(18).  
Application  
of the rule  
in *Shelly's*  
case.

The rule in *Shelly's* case will not apply, unless the estates are both of one quality, that is, both legal, or both equitable. Therefore, if the estate limited to the ancestor be an equitable trust estate, and that to his heirs carries the legal estate, or *vice versa*, they cannot coalesce. Where *E. S.*, being seised in fee of certain estates, made a feoffment to the use of himself and his heirs until his marriage, and afterwards to his intended wife for life, then to the use of trustees and their heirs, during the life of him the said *E. S.* upon trust, to permit him to receive the rents &c. and to support contingent remainders, then to the first and other sons of his body in tail male, remainder to the heirs of the body of *E. S.*, the ultimate remainder being to his own right heirs. It was held, that the heirs of the body of *E. S.* should take by purchase, and not by descent. It will be observed, that in this case the fee simple was vested in the trustees during the life of *E. S.* so that he had only an equitable estate; and the remainder to the heirs of the body of *E. S.* was a contingent remainder. And where a testator devised to trustees and their heirs, upon trust, to stand seised of the lands during the term of the natural life of the testator's son *J.*, to such use and behoof as after mentioned, viz. that the trustees should yearly and every year during the natural life of the said *J.* take and receive the rents, issues, and yearly profits of the premises; and the testator ordered that such rents, &c. should be applied for the subsistence and maintenance of the said *J.* during his natural life; and immediately from and after his decease he devised the same premises unto the heirs of the body of the said *J.* lawfully to be begotten, and for default of such issue then to his own right heirs; the court held that the use was not executed in the testator's son, but in the trustees during his life, from the nature of the trust to receive and pay over the profits, and the application directed for the subsistence and maintenance of the son, by which the testator seemed to invest the trustees with some degree of discretionary power in that respect; and there being nothing in the nature of the trust to prevent the limitation to the heirs of his body from being a use executed, they held the two limitations did not unite so as to give *J.* an estate tail; and of course the heirs would be in

by purchase. *Silvester v. Wilson*, 2 T. R. 444. Fearne, Cont. Rem. 52—57.

Again, the estates must (to come within the rule in *Shelly's* case), be both freehold; for if a lease for years be made to *A.*, the remainder to *B.* in tail, the remainder to the right heirs of *A.*, there the remainder vesteth not in *A.*, but the right heirs shall take by purchase, when the remainder vests. Co. Litt. 319 b. As where *A.* made a settlement to the use of himself, for ninety-nine years during his life, and remainder to the use of the heirs of his body, remainder to himself in fee, Lord Chancellor Cooper held this limitation to the heirs of the body, to be plainly a contingent remainder, and the heirs took by purchase. *Else v. Osborne*, 1 P. Wms. 387. And again the subsequent limitation to the heirs to come within the application of the rule, must be confined to those of the ancestor, who takes a particular estate; for if it be to feme for life with remainder to the heirs of the bodies of baron and feme, the heirs of their bodies shall be in by purchase, and not by descent, for the freehold was in the feme alone. In the case of *Denn* dem. *Trickett v. Gillott*, 2 T. R. 435, Mr. Justice Buller, in delivering judgment, said, if an estate be limited to *A.* for life, remainder to the heirs of the bodies of *A.* and *B.* it is not an estate tail. That was settled in *Gasage v. Taylor*, which was cited by Bathurst, J. in the case of *Frogmorton* dem. *Robinson v. Wharrey*, 2 Bl. Rep. 728. 3 Wils. 125. 144. There Sir *R. Frank*, on the marriage of his son, levied a fine, and declared the uses to himself, during the joint lives of himself and his son *L. F.*; and after the decease of either of them, to the use of *Susan*, the intended wife, for life, and after her decease, to the use of the issue male of the said *Susan* and *L. F.*, and the heirs of their bodies; and in default of such issue, to the use of the heirs of the body of *Susan* by the said *L. F.*; remainder to the right heirs of Sir *R. Frank*. The marriage took effect, *Susan* died leaving five daughters but no son, Sir *R.* died leaving the said *L. F.* his son and heir. A question arose as to the estate which *L. F.* took; and the Court resolved, first, that if he had been joint-tenant with the wife for life, this had been an estate tail in both, as the word "heirs" is not applied to any body particularly. See Lit. s. 28. Secondly, that neither the husband nor wife had an estate tail: not the hus-

band, because he had no prior estate for life; not the wife, because she took an estate for life, yet the heirs are not applied to her body only. And thirdly, that it was a contingent remainder to the heirs of both their bodies. It must, however, be observed, that there are some instances wherein the subsequent limitation to the heirs of the body have been so qualified, and by other additional words, as to amount to words of purchase, and not of limitation; or in other words, where there are words of limitation engrafted on the remainder to the heirs inconsistent with the nature of the descent pointed out; as to A. for life, with remainder to his heirs, and the heirs female of their bodies, 1 Rep. 95 b; or if there are explanatory words added as to B. and his heirs lawfully to be begotten, that is to say, to his first, second, and other sons, or to "A. and the heirs male of her body begotten or to be begotten as tenants in common, and not as joint-tenants, and if such issue should die before he, she, or they should attain twenty-one, then to B. in fee, or to A., and after her decease to the heirs of her body, share and share alike, if more than one."

The rule in *Shelly's* case is not applied to devises, where the limitation is to sons or children; and therefore a devise to A. for life, with remainder to his sons or children, or to his first and other sons or children, carries an estate for life only to A. *Good-right* dem. *Docking v. Dunham*, Dougl. 264. 1 Roll. Abr. 837. *Ginger v. White*, Willes, 348.

Mr. Fearne, in closing his elaborate discussion of the rule in *Shelly's* case, remarks, that, after all, we are constrained to admit that whatever have been or may be the attempts to reduce the rule in *Shelly's* case to one indisputable line of application in testamentary dispositions, it will ever remain impossible to deliver the subject from that difficulty, which, in some instances, must leave our conclusions afloat respecting the existence of those premises, on which the application is made to depend, viz. the testator's intent equally to include the whole line or denomination of heirs expressed. This will happen wherever inconsistent expressions or dispositions in the will suspend the militating argument of intention nearly *in equilibrio*. But such cases must be few in comparison of the great majority, wherein the answer to that enquiry will be pretty readily and satisfactorily decided.

XCIV. I do hereby give and devise all the General de-  
 manors, messuages, lands, and other heredita-  
 ments comprised in and assured by the herein-  
 before recited indentures of lease and release  
 and settlement, with their rights, members,  
 and appurtenances, (subject to the mortgages  
 affecting the same), and also all other the ma-  
 nors, capital and other messuages, lands, tene-  
 ments, and hereditaments, wheresoever situate,  
 of or to which I or any person or persons in  
 trust for me now is or are seised or entitled  
 for an estate of freehold and inheritance, or of  
 freehold in possession, reversion, remainder,  
 or expectancy, or which, by virtue of any spe-  
 cial power, I am enabled to appoint by this my  
 will, with the rights, members, and appurtenan-  
 ces, (except the estates vested in me in trust, or  
 by way of mortgage, or under any lease or leases  
 for lives), to the uses and in the manner follow- to the uses,  
 ing, that is to say, (*see p. 333, n.*), to the use and and in the  
 intent that my said wife , in case she manner af-  
 shall survive me, and her assigns, may receive ed.  
 during her life (and in bar of her dower and For secur-  
 thirds, an annual sum of £ , of lawful mo- ing annuity  
 ney of Great Britain, clear of all deductions to wife.  
 and abatements whatsoever, to be issuing out  
 of the said manors, messuages, hereditaments,  
 and premises hereinbefore devised, and to  
 be paid, &c. (*See Clause L.*) And subject To the use  
 thereto, to the use of [trustees], their execu- of trustees  
 tors, administrators, and assigns, for a term of  
 for a term of years.

of 500 years, to be computed from the day of my decease, and thenceforth next ensuing, and fully to be complete and ended, without impeachment of waste, upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same ; And after the expiration or other sooner determination of the said term of 500 years, and in the

Subject thereto, mean time subject thereto and to the trusts thereof, To the use of my eldest son *William* and his assigns during his life, without im-

Remainder to the use of my said son *William*, to the use of the first and every other son of my said son, severally and successively, according to his respective seniority, in tail male; And in default of such

Remainder to the use of his assigns, during his life, without impeachment of waste; and after the decease of my

Remainder to the use of said son *Thomas*, to the use of the first and every other son of my said son *Thomas*, severally and successively, according to his respective seniority, in tail male; And in default of such issue, to the use of my third and every

Remainder to the use of other subsequently born son, and his assigns, severally and successively, in the order of his birth, during his life, without impeachment of waste; and after his respective decease, to the

Remainder to the use of his respective first and every other son severally and successively, according to his first and every other respective seniority, in tail male; but so that

the respective son or sons of the elder of my son of such  
 said subsequently born sons, and his or their sons successively, in  
 issue male, shall always take before and be preferred to the  
 tail male, according to seniority.  
 younger of my said subsequently born sons,  
 and his or their issue male; And in default of Remainder  
 such issue, to the use of my eldest daughter to the use  
*Jane* and her assigns, during her life, without daughter for  
 impeachment of waste; and after the decease of eldest  
 of my said daughter *Jane*, to the use of the of first and  
 first and every other son of my said daughter, every other  
 severally and successively, according to their daughter son of said  
 respective seniority, in tail male; And in de-successive-  
 fault of such issue, to the use of my second male.  
 and every other subsequently born daugh- to the use  
 ter, and her assigns, severally and successively, and every  
 in the order of her birth, during her life, with- subsequent-  
 out impeachment of waste; and after her re- ly born  
 spective decease, to the use of her respective successively.  
 first and every other son severally and succes- Remainder  
 sively, according to his respective seniority, in to the use of her respect-  
 tail male; but so that the respective son or first  
 sons of the elder of my said subsequently born and every  
 daughters, and his or their issue male, shall other son,  
 always take before and be preferred to the re- ly, in tail  
 spective son or sons of the younger of my said male, according to  
 subsequently born daughters, and his or their seniority.  
 issue male; And in default of such issue, to Remainder  
 the use of my said wife *Catherine* and her as- to the use  
 signs, during her life, without impeachment of wife, for  
 waste; And after the decease of my said wife, Remainder

to the use of first and every other son of every son of my body, now born or hereafter to be born, severally and successively, according to his respective seniority, in tail; but so that the respective son or sons of the elder of such sons of my body, and such his or their respective issue, as aforesaid, shall always take before and be preferred to the respective son or sons of the younger of such sons of my body, and such his or their respective issue as aforesaid.

**Remainder to the use of first and every other son of every daughter, successively, in tail, according to seniority.**

such sons of the elder of such daughters of my body, and such his or their respective issue as aforesaid, shall always take before and be preferred to the respective son or sons of the younger of such daughters of my body, and such his or their respective issue as aforesaid.

**Remainder to the use of first and every other daughter of eldest son, successively, in tail.**

**Remainder to the use of first, and every other daughter of second son, successively, in tail.**

such daughters of the eldest son *William*, severally and successively, according to her respective seniority, in tail; And in default of such issue, to the use of the first and every other daughter of my said son *Thomas*, severally and successively, according to her respective seniority, in tail; And in default of such issue, to the use of the first and every other daughter of my said son *Thomas*, sev-

rally and successively, according to her respective seniority, in tail; And in default of such issue, to the use of the first and every other daughter of my third and every other subsequently born son, severally and successively, according to her respective seniority, in tail; but so that the respective daughter or daughters of the elder of my subsequently born sons, and such his or their respective issue as aforesaid, shall always take before, and be preferred to, the respective daughter or daughters of the younger of my said subsequently born sons, and such their respective issue as aforesaid; And in default of such issue, to the use of the first and every other daughter of my said daughter *Jane*, severally and successively, according to her respective seniority, in tail; And in default of such issue, to the use of the first and every other daughter of my second and every other subsequently born daughter, severally and successively, according to her respective seniority, in tail; but so that the respective daughter or daughters of the elder of my said subsequently born daughters, and such her or their respective issue as aforesaid, shall always take before, and be preferred to, the respective daughter or daughters of the younger of my said subsequently born daughters, and such her or their respective issue as aforesaid; And in default of such issue, to the use of my sister *Elizabeth*, the wife of A. B., and her assigns, Remainder to the use of first and every other daughter of my third, and every other subsequently born son, severally and successively, in tail, according to seniority.

during her life, without impeachment of waste ;  
 Remainder And after the decease of my said sister *Elizabeth*, to the use of C. D. and his assigns, during his life, without impeachment of waste ;  
 to the use of  
of C. D. for  
life.  
 Remainder And after his decease, to the use of *John*, the eldest son of the said C. D., and his assigns, during his life, without impeachment of waste ;  
 to the use of  
his eldest  
son for life.  
 Remainder And after the decease of the said *John D.* to the use of the first and every other son of the said *John D.* severally and successively, according to his respective seniority, in tail male ;  
 to the use of  
first and  
every other  
son of said  
son, suc-  
cessively, in  
tail male.  
 And in default of such issue, to the use of *James*, the second son of the said C. D., and his assigns, during his life, without impeachment of waste ; and after the decease of the said *James D.*, to the use of the first and every other son of the said *James D.* severally and successively, according to his respective seniority, in tail male ; And in default of such issue, to the use of the third and every other subsequently born son of the said C. D. who shall be born during my life, or in due time after my decease, and his assigns, severally and successively, in the order of his birth, during his life, without impeachment of waste ; And after his respective decease, to the use of his first and every other son, severally and successively, according to his respective seniority, in tail male ; but so that the respective son or sons of the elder of the said subsequently born sons of the said C. D. and their issue shall always take before, and be

preferred to, the respective son or sons of the younger of the said subsequently born sons of the said C. D., and his or their issue male;

And in default of such issue, to the use of every son of the said C. D. who shall not be born in my life-time, or in due time after my decease, severally and successively, according to his respective seniority, in tail male; And in default of such issue, to the use of my own right heirs for ever. And for the purpose of preserving the contingent remainders hereinbefore devised from being destroyed, I devise the manors, messuages, hereditaments, and premises herein before devised to any person, during his or her life, after the determination of that estate by forfeiture or otherwise, in his or her respective life-time, to the use of [trustees] and their heirs, during the life of the tenant for life whose estate shall so determine\*.

\* The statute of uses, 27 Hen. VIII. c. 10, preceded the statute of wills, 32 Hen. VIII. c. 1, explained by statute 34 & 35 Hen. VIII. c. 5. It has been said, that therefore the statute of uses does not necessarily extend its operation to uses created by wills. See Mr. Butler's note, Co. Litt. 271 b. But according to Lord Coke it is frequent in our books, that an act made of late time should be taken to be within the equity of an act made long before. 4 Rep. 1.

A testator devised lands to trustees, their heirs and assigns; upon trust, out of the rents and profits, or by sale or mortgage, to pay all the testator's just debts; and after payment thereof, he devised the same estates to three of the same trustees, their executors, &c. for 500 years, upon trust, to pay legacies and an annuity; and after the determination of the said term, he devised

Devise to  
trustees of  
all estates

XCV. I give, devise, and bequeath unto  
[*trustees*], their heirs, executors, administra-

Operation  
of the stat.  
of uses on  
devises.

the same premises to all the trustees and their heirs in trust, as to one moiety, to the use and behoof of T. B. for and during the term of his natural life, without impeachment of waste; and from and after the determination of that estate, he devised the same to the trustees for the life of T. B. to preserve contingent remainders; and from and after his decease, then to the use and behoof of the heirs of the body of T. B. lawfully begotten; and for want of such issue, then to his nephew B. B. for and during the term of his natural life, without impeachment of waste; and from and after the determination of that estate, to the same trustees for and during the life of B. B. to preserve contingent remainders; and from and after his decease, then to the use of the heirs of the body of B. B. lawfully begotten; with like remainders to other nephews. T. B. died without issue. The Master of the Rolls observed, that this was a trust estate, and not a legal estate; that it might have been otherwise, if no particular estate had been given to the trustees, and it had been given only for the payment of debts generally; and that in this it differed from the case of *Gore v. Gore*, 2 P. Wms. 28. *Stanhope v. Thacker*, Prec. Ch. 435. That there is no doubt but that if an estate is devised to a man and his heirs, *to the use of him and his heirs*, that this would be a use executed, and all the subsequent limitations would be trust estates; and that this was different from *Popham v. Bainfield*, 1 Vern. 79., for there the estate tail was executed by the statute, and is like *Cordell's* case, Cro. Eliz. 315, and *Manning's* case, 8 Co. 94 b. *Bagshaw v. Spencer*, 2 Atk. 570. On appeal from the decree at the Rolls, Lord Hardwicke, with reference to the question, whether the estate devised to B. B. was a trust, or a legal estate, said, that it was a use executed, or a mere trust in equity; and he was of opinion, that it was a mere trust in equity. The devise was to trustees and their heirs, which carries the whole fee in law; the devise to sell would have carried the fee; and that the whole fee being devised to trustees, no legal fee could be limited upon it, and B. B. could take no legal estate. 2 Atk. 577; S. C. 1 Ves. 142.

tors, and assigns, all my freehold, leasehold, not included  
and copyhold manors, messuages, farms, lands,<sup>in settle-</sup>  
<sup>ment;</sup>

A devise to trustees and their heirs, to the use of them and their heirs, upon several trusts in the will mentioned, was said by Lord Hardwicke to be a clear use in the trustees executed by the statute. *Hopkins v. Hopkins*, 1 Atk. 590. So where a testator devised to trustees, their heirs and assigns, and declared that the trustees and their heirs should, by force of that his last will and testament, stand and be seised of the premises, to all the uses, intents, and purposes thereafter mentioned; first, of intent and purpose, that they should permit and suffer G. R. his son to have, receive, and take the rents for his life, and after his decease, should stand seised thereof, to the use of the heirs of the body of the said G. R., with remainder over. It was contended, that the devise to the trustees, to the intent that G. R. should take the profits, was an use executed in him; that before the statute of 27 Hen. VIII. this would have been an use in G. R. and the trustees would have been seised to the use, or in trust for G. R. and then it would be executed in possession by the express words of the 27 Hen. VIII. c. 10, where the words are, that where any person shall be seised of any manors, lands, &c. to the use, confidence, or trust of another in fee, tail, or for life, such use shall be executed in possession. In regard to the point, that the intent of the devisor will govern the raising of uses, that which is meant by the books is, that the judges will not adjudge an use or interest to pass contrary to the intent of the party; but there is no authority in any book that the intent of the party can hinder the operation of the law. And therefore the counsel for the defendant concluded, that this was a use executed in G. R.; and of that opinion was the whole court; and they agreed, in omnibus, with the defendant's counsel. They said, that a use and trust, (as to the words themselves) were of the same import as to the execution by the statute. For if a feoffment be in fee to A. in trust, to permit E. to take the rents, &c. this will be an use executed, as well as if A. had made use of the word "use." *Broughton v. Langley*, 2 Lord Raym. 873. See also *Thompson v. Lawley*, 2 Bos. & Pull. 303.

**tenements, and hereditaments, wheresoever situate, and which I have power to dispose of by**

**Operation of the stat. of uses on devises.** As the testator's intention is generally the guide in cases of devises, it has been repeatedly held, that in case of a devise to

A. and his heirs, to the use of or in trust for B. and his heirs, or in trust, to permit B. and his heirs to take the profits, it shews that the testator intended that B. should have the legal estate in fee; and the law will therefore give the devise such an operation.

*Doe dem. Leicester v. Biggs*, 2 Taunt. 109. See also *Brydges v. Wotton*, 1 Ves. & Bea. 137, where the Master of the Rolls said, that where a trust was to pay unto, or permit and empower M. B. to receive and take the rents and profits during her life, it was by no means clear that this was not an use executed in her. A devise to the use of A. for life, remainder over, this cannot take effect by way of use executed by the statute, because there is no seisin to serve the use, but still the *cestui que use* will have the legal estate. 1 Sand. 206. So in case of a devise in trust to pay unto, or else to permit and suffer the testator's niece (a feme covert) to receive the rents, it was held that the legal estate was executed in the niece. And it was observed, that in a deed the first words, in a will the last words, prevail; thus the words "to permit" were held to give the legal estate to the niece. *Doe dem. Leicester v. Biggs, supra.* And in the same case it was held, that a devise "*in trust to pay unto*" gives the legal estate to the trustee.

Mr. Butler notices Mr. Booth's opinion at the end of Shep. Touchst. in two copies of which the following note is added:—"P. S. Powers under wills are not like powers under conveyances, operating by way of use. The execution of a power under a devise is not the limitation of a use; no, not where the devise is to uses; as where there is a devise to I. S. and his heirs, to the use of A. for life; remainder to B. in tail, with power for A. to limit a jointure, or lease, or charge; here there will be no seisin in I. S., consequently no such use in A. or B. as is executed by the statute of uses; consequently the execution of the power is no use; it operates as a devise under the statute of wills." But, in reply to this opinion of Mr. Booth, it has been observed,

this my will, and which are not included in the settlement made on my marriage with my pre-

that in another opinion of the same gentleman, the authenticity of which is equally well known, he says, speaking of a power of exchange under a will to a tenant for life, that when the tenant for life executes his power of exchanging, he is the declarer of the use, and a fee passes out of the estate of the persons who are the devisees to the uses in the will; for it has been resolved, that a devise to an use may be, as well as a feoffment, to an use, and the uses under such devise will have the same operation as uses under a feoffment. Sug. Pow. p. 130, (n).

To prevent these questions from arising, Mr. Sugden advises (see Treatise of Powers, 134,) that the estates should be devised to the devisees at once, and not through the medium of a devisee, to uses. Where the limitations in a will are numerous, a seisin to serve them is frequently created for the sake of brevity, as it saves the repetition of words of gift preceding every limitation. But the same purpose will be effectually answered by devising the estates "to the uses after expressed," without naming any devisee to the uses, and then going on in the usual way with the limitations. If it should be thought necessary in any case to raise a seisin to serve the uses, in order to attract the statute of uses, several devisees to the uses should be named; so that in case of the death of any of them in the life-time of the testator, the estate might survive to the others, which it would certainly do if the estate was given to them, as it of course ought to be, as joint tenants. Fonblanc. Notes on Treatise of Equity, 2 vol. c. 3.

Uses limited of copyhold estates are not within the statute of uses, and a surrender of copyhold lands to uses is not to be considered on the footing of a use or trust, for they are not within the statute; therefore such surrender is only a direction to the lord whom to admit; and when admitted, the surrenderee is in by grant of the lord, not of the surrenderor, so that it is of a particular nature, and not as a use or trust on the statute. *Rigden v. Vallier*, 2 Ves. 252.

Chattels real are also excluded from the operation of the statute; for, to use the words of Lord Bacon (see Reading on the

sent wife; to have and to hold the said several manors, messuages, farms, lands, tenements, and hereditaments hereinbefore mentioned, and hereby devised and bequeathed, with their rights, members, and appurtenances, unto the said [trustees], their heirs, executors, administrators, and assigns, according to the nature and tenure of the same premises, upon the trusts hereinafter mentioned; that is to say; as to such of the said premises as are freehold, Upon trust, that they the said [trustees], or the survivor of them, or the heirs or assigns of such survivor, do and shall, as soon as conveniently may be after my decease, settle, convey, and assure, or cause to be settled, conveyed, and assured, the said freehold estates, so and in such manner that the estates may be and remain to the uses, and upon the trusts hereinafter mentioned; that is to say;

To the use of C. D. for life.

Remainder to the use of his son for life.

Remainder to the use of his sons

Statute of Uses, 42), "the second word in the statute material on the part of the feoffees, is the word *seised*; this excludes chattels. The reason is, that the statute meant to remit the common law; and not but that the chattels might ever pass by testament or by parol, therefore the use did not prevent them." There must be an estate or seisin, out of which an use can arise.

rally and successively, according to their re-  
spective seniorities, in tail male; And for default in tail male.  
of such issue, to the use of every son of the said to the use  
C. D. who shall be born in my life-time, or in of every son  
due time after my decease, and their respective in life-time,  
issue male, in manner hereinafter mentioned; &c. of testator,  
that is to say; every such son to take the said for his life,  
estates in the order of his birth, during his life, according to  
without impeachment of waste; and after his de- Remainder  
cease, the said estates to be and remain to the use to the use  
of the first of the first and every other son of his body, seve- and every  
rally and successively according to their respect- other son of  
ive seniorities, in tail male, so that the elder of his body  
the said sons of the said C. D., and the first and male.  
other sons of his body, and the heirs male of  
the body and respective bodies of the last men-  
tioned son and sons, may always be preferred  
to and take before the younger of the said son  
and sons, and his and their son and sons, and  
the heirs male of the body and respective bo-  
dies of the last mentioned son and sons; and Remainder  
for default of such issue, to the use of the first to the use  
and every other son of the said C. D. who shall of the first  
not be born in my life-time, or in due time after and every  
my decease, severally and successively, accord- other son of  
ing to their respective seniorities, in tail male; C. D. born  
and for default of such issue, to the use of *Jane* in life-time  
*Mary*, the two infant daughters of the of testator  
said C. D., and every other daughter of the successive-  
said C. D. hereafter to be born, and to be di- ly,  
in tail male.  
Remainder to the use  
of infant daughters  
of C. D.

as tenants in common in tail, in equal shares, with cross remainders between or among them, in tail; and if all the said daughters, save one, shall die without issue, to the use of that one or only daughter, in tail, and for default of such issue, to the use of *Elizabeth*, the wife of G. H., and her assigns, during her life, without impeachment of waste; and after her decease, to the use of her only son R. H. and his assigns, during his life, without impeachment of waste: and after his decease, to the use of his first and every other son and sons successively, according to their respective seniorities, in tail: and for default of such issue, to the use of *Ann*, *Jane*, and *Sarah*, the only daughters of the said *Elizabeth H.*, during their respective lives, in equal shares; and after the respective death of each such daughter of the said *Elizabeth H.*, the respective share in the said hereditaments to which she shall, or on surviving me should have been entitled, as aforesaid, shall be and remain to the use of her first and other sons, severally and successively, according to their respective seniorities, in tail; and for default of such issue, to the use of her respective daughters, as tenants in common in tail, in equal shares, with cross remainders, between or among them, if more than one, in tail; and if all such last mentioned daughters, save one, shall die without issue, or if there shall be but

*feme covert*

as to the share of each daughter, to the use of her first and other sons successively, in tail.

as to the use of her daughters, as tenants in common in tail, in equal shares, with cross remainders, between or among them, if more than one, in tail; and if all such last mentioned daughters, save one, shall die without issue, or if there shall be but

one such daughter, to the use of such surviving  
 or only daughter, in tail; And so that in default  
 of such issue as aforesaid, of any one or more remainders  
 of the daughters of the said *Elizabeth H.*, as well the share or shares hereby directed to be originally limited to the daughter or daughters of such only who shall so die, or whose issue shall so fail, as well as the share or shares which, by virtue of this present clause, shall have survived or accrued to any such surviving daughters, or to her or their issue respectively, may go and remain to the use of the other or others of such daughters of the said *Elizabeth H.* in equal shares and proportions, during their respective lives, without impeachment of waste; and so that, after their respective decease, the share of each of them may go and be to the use of her respective issue male and female, in the order and course, and for the estates in and for which I have hereinbefore directed her original share to be settled; and so that, in case there shall be a failure of such issue as aforesaid of all the daughters of the said *Elizabeth H.* save one, the entirety of the said hereditaments shall be and remain to the use of that remaining daughter and her assigns, during her life, without impeachment of waste; and after her decease, to her sons severally and successively, according to their respective seniorities, in tail male; and for default of such issue, to the use of all and every her daughter

ants in common in tail,  
 with cross  
 in tail.  
 If only one  
 daughter,  
 to the use  
 of said  
 daughter,  
 in tail.  
 Benefit of  
 survivorship  
 and accrue  
 amongst the  
 daughters  
 of said female  
 covert.

Ultimate  
remainder  
to right  
heirs of test-  
ator.  
That power  
shall be re-  
served for  
tenants for  
life, to ap-  
point joint-  
tures.

and daughters, to be divided between or among them, if more than one, as tenants in common in tail, with cross remainders between or among them in tail; And for default of such issue, to the use of my own right heirs for ever. And I direct that in the settlement hereinbefore directed to be executed, there shall be contained a proviso, enabling each of them, the said C. D. and E. F., as and when, by virtue of the limitations hereinbefore mentioned, he shall respectively be in the possession of, or entitled to the rents, issues, and profits of the said hereinbefore mentioned manors and other hereditaments, by any deed or deeds, instrument or instruments, in writing, with or without power of revocation, to be by him sealed and delivered in the presence of and to be attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of and attested by three or more credible witnesses, to limit or appoint unto, and to the use of, or in trust for any woman or any women whom he may marry, for the life or lives of such woman or women respectively, and for her or their jointure or jointures, and in bar, or without being in bar, of her or their dower, any annual sums or yearly rent charges, annual sum or yearly rent charge, not exceeding in the whole, in respect to each person exercising such power, the yearly sum

of £ , of lawful money of Great Britain, to be issuing and payable out of, and charged and chargeable upon, all or any part of the said manors and other hereditaments hereinbefore directed to be settled, with the rights, members, and appurtenances, clear of all Parliamentary taxes and outgoings whatsoever: And to be paid in such manner as to him shall seem meet: And for the purpose of securing such annual sums, or yearly rent charges respectively, to limit or appoint to the woman or women respectively, for the benefit of whom such annual sum or yearly rent charge, or annual sums or yearly rent charges, shall be so appointed as aforesaid, usual powers and remedies for recovering and enforcing payment thereof, respectively, by distress and entry upon, and perception of rents, issues, and profits; And also to limit or appoint the same hereditaments respectively, to any person or persons whomsoever, for ever, for any term or terms for years, as a further security for the payment of the said annual sums or yearly rent charges, annual sum or yearly rent charge, respectively, to take effect immediately after the decease of such of them, the said C. D. and E. F., who shall limit or create the same respectively, as to them, the said C. D. and E. F. respectively, shall seem meet; but so that every such term or terms for years be made to determine on the death of the women respectively, for the benefit of

And usual  
powers of  
distress and  
entry;

the heredi-  
taments for  
a term of  
years, for  
further se-  
curing the  
same.

whom the same shall be created, and the payment of the arrears of their respective rent charges, and the expenses to be incurred by the non-payment of the same, respectively:

*Copyhold and leasehold estates to be settled* And as to the said copyhold and leasehold estates, I direct that the said [trustees], or the survivor of them, or the heirs, executors, administrators, and assigns of such survivor, shall settle and assure the same, So and in such manner, that the said estates may be and remain to the uses, upon the trusts, and subject to the powers, provisoies, and declarations to, upon, and subject to which the hereinbefore mentioned freehold estates are hereinbefore directed to be settled and assured, or as near thereto as the difference of the tenure, and other circumstances, will permit; but so that the said leasehold estates shall not, for the purpose of transmission, vest in any tenant in tail male, or in tail, under the settlement to be executed in pursuance of this my will, who shall not attain the age of twenty-one years: Yet, nevertheless, such infant tenant in tail male, or in tail, shall, during his or her minority, be entitled to the yearly rents, issues, and profits of the said hereditaments: And I direct, that in the settlement of the said leasehold estates, there shall be inserted full and sufficient clauses to enable the trustees or trustee for the time being, to renew the subsisting lease and leases of the said leasehold premises.

*to same uses, &c. as freehold,*

*or as near as the difference of tenure will admit.*  
*But leaseholds not to vest in infant tenant in tail male, or tenant in tail for transmission;*  
*but to be entitled to rents.*

XCVI. To the use of the first son of my son, Limitation and the heirs male of the body of such first son issuing: And for default of such issue, To the use of first son of testator in tail male. use of the second and every other son of my body, severally, successively, and in remainder, one after another, in order and course as they shall respectively be in priority of birth, and the heirs male of the body and respective bodies of all and every such sons and son issuing; the elder of such sons, and the heirs male of his body, being always to take before and be preferred to the younger of the same sons, and the heirs male of his and their body and respective bodies: And in default of such issue, To the use of all and every daughter of my body lawfully begotten, to be divided between or amongst them, if more than one, in equal shares, as tenants in common; and the heirs of the respective bodies of all and every such daughters and daughter issuing: And in case there shall be more than one such daughter of my body, entitled or inheritable as aforesaid, And there shall be a failure of issue of any one or more of them, then, as well the original share or shares of the daughter or daughters so dying, and whose issue shall so fail, as the share or shares which shall have survived, or accrued due to such daughter or daughters, or to their or any of their issue, To the use of all and every other

**Cross re-**  
**mainders**  
**between**  
**them in tail.** the daughters and daughter of my body, lawfully to be begotten, to be divided between or amongst them, if more than one, in equal shares, as tenants in common, and the heirs of their

**If only one**  
**daughter,**  
**then the**  
**whole to**  
**such daugh-**  
**ter in tail.** respective bodies issuing: And if all my said daughters save one shall die without issue, or there shall be but one such daughter, then, as to the entirety of my said manors, hereditaments, and real estate, To the use of such one or only daughter, and the heirs of her body issuing:

**Remainder**  
**to the use of**  
**every son**  
**'of testator**  
**successive-**  
**ly,**  
**in tail gene-**  
**ral,** And in default of such issue, To the use of all and every the sons and son of my body, lawfully to be begotten, severally, successively, and in remainder, one after another, in order and course as such sons shall respectively be in priority of birth, and the heirs of the body and respective bodies of such son or sons according to issuing; the elder of such sons, and the heirs

**seniority.** of his body issuing, being always to take before and be preferred to the younger of such sons and the heirs of his and their body and respec-

**Remainder**  
**to the use of**  
**testator's**  
**right heirs**  
**in fee.** tive bodies issuing: And in default of such issue, To the use of my own right heirs for ever.

**Devise of**  
**estate in**  
**contract.** XCVII. I give and devise unto A. B. of &c. his heirs and assigns for ever, the freehold estate situate at , which I have contracted to purchase for the sum of £ , from Mr. J. D. of &c.\* And in case a good and suffi-

**As to estates**  
**contracted**  
**to be pur-** \* It is an established rule in Equity, that from the time an estate is contracted to be sold, the vendor is a trustee for the ven-

cient title to the said estate cannot be made, I direct that my executors shall lay out and invest the sum of £ , being the amount of such purchase money, in the purchase of free-

dee; and with regard to the equitable interest created by the chased by contract, a purchaser before conveyance is in equity the owner of testator. the estate, almost to every purpose.

A purchaser may, by will, duly executed, dispose of the estates agreed to be purchased, for he has a virtual legal constructive possession. And though the will be made previously to the contract, yet if the words of the devise be sufficiently comprehensive to embrace such after-purchased lands, they will pass under the will, provided the same be duly republished after the making of the contract. If the purchaser die before the conveyance is made, his interest, as between his representatives, is considered as real estate. But if the vendor die before payment of the purchase money, it will go to his executors, in augmentation of his personal estate. So much of the personalty as would serve for the purchase of the property is considered as having lost the quality of personalty, and as having become real estate. In case the purchaser die without devising the estate, his heir at law will be entitled to claim it as part of the real estate of his ancestor, and may compel the executor or administrator to pay the purchase money out of the personal estate. But in case of a *defect of title*, whereby the contract cannot be carried into effect, the heir, or devisee of the purchaser, is not entitled to have the purchase completed notwithstanding the defect; nor has he any claim upon the personal estate, either to have the purchase money paid over to him, or to compel the purchase of another estate for his benefit. Hence arises the necessity of the declaration in the text. But if the contract is dissolved, because the purchase money cannot be paid so soon as necessary, the heir or devisee will be entitled to have the amount of the money laid out in other lands. *Acherley v. Vernon*, 10 Mod. 518. *Green v. Smith*, 1 Atk. 572. *Pollexfen v. Moore*, 3 Atk. 272. *Potter v. Potter*, 1 Ves. 437. *Laneford v. Pitt*, 2 P. Wms. 629. *Whittaker v. Whittaker*, 4 Bro. Ch. Ca. 30. *Broome v. Monck*, 10 Ves. 597.

hold, leasehold, or copyhold messuages, lands, tenements, and hereditaments, in such part of England or Wales, as the said A. B. his heirs or assigns shall by writing under his or their hand

*Rawlins v. Burges*, 2 Ves. & Bea. 382. *Holmes v. Barker*, 2 Madd. 462. See note "Republication."

On referring to the case of *St. John v. The Bishop of Winton*, 1 Cowp. 94, it will appear necessary, in order to remove all doubt, whether estates, not actually conveyed to the testator, but remaining in contract, though in different stages of progress will pass, that the devise of such estates should be expressed in general terms: As for instance, where a testator said, "for the purchase whereof I have *already* contracted and agreed," three species of estates were held to pass: one by articles that rested *wholly executory*, another by articles *not wholly executory*, (nearly a third part of the purchase money having been paid), and a third which had been carried into execution by a very recent conveyance. It was considered, that the testator intended those purchases should pass, which he had recently entered into. But if he had said, "for the purchase of which I have *only* contracted and agreed," Lord Mansfield thought, that the estates for which great part of the purchase money had been advanced, would not have passed to the devisee, because that contract and agreement was more than made; it was partly carried into execution.

If a man, possessed of a term of years, contract for the purchase of the inheritance, the term, by construction of law, instantly attends the inheritance. And it is a rule, that in Equity, a term assigned in trust to attend the inheritance, will follow all the estates created thereout, and all the incumbrances subsisting upon such inheritance, and is so connected with it, that equity will not suffer it to be severed to the detriment of a *bond fide* purchaser.

A devise therefore of the estate, subsequently to the contract, will pass the fee simple before the conveyance, and will pass the term as attendant on it. *Carlton v. Low*, 3 P. Wms. 328. *Capel v. Girdler*, 9 Ves. 509.

direct or appoint; And that upon payment of the said sum of £ by my said executors, such hereditaments so to be purchased shall be conveyed and assured unto and to the use of the said A. B. his heirs, executors, administrators, and assigns, according to the tenure thereof, in lieu and instead of the said estate which I have contracted to purchase from the said J. D. And until a proper purchase be found, I direct my said executors to pay the interest and annual produce of the said sum of £ , to the said A. B. for his own use.

XCVIII. I declare it is my intention to com- Copyholds  
prise under the words " lands, tenements, and intended to  
hereditaments," hereinbefore used, such of my be included  
lands, tenements, and hereditaments, if any, in under genera-  
the places in reference to which they are used,  
as are, or may be, of the nature of copyhold \* ,  
words.

\* Notwithstanding the alteration of the law introduced by the Copyholds statute 55 Geo. III., it is desirable to state the previous decisions of the courts, in order to explain the general principles by which the passing of copyhold estates belonging to a testator are governed.

Copyholds are not within the statute of frauds, requiring the attestation of three witnesses to a will. They stand on the stat. Henry VIII. which passes lands by will in writing, though there be no witness at all; of which there are several cases by Lord Coke, as of a will written and not finished, which was good for so much. *Attorney-General v. Barnes*, 2 Vern. 597. *Attorney-General v. Andrews*, 1 Ves. 224. A devise of copyholds operates only as a declaration of uses on the surrender to the use of the will; and therefore, if the form required by the surrender,

**whether the same shall or shall not have been surrendered to the use of my will: And I di-**

**Copyholds.** which is nothing more than a testamentary declaration in writing, is observed, it is sufficient, without any witness. And even a nuncupative will of copyholds was an effectual declaration of the uses, when the surrender was silent as to the form, till the stat. 29 Ch. II. required all declarations of trusts to be in writing. *Co. Lit.* 111 b. n. 3. *Tuffnell v. Page*, 2 Atk. 37.

The power of devising copyholds through the medium of a surrender, was originally wholly dependent upon special custom. But in *Pike v. White*, 3 Bro. Ch. 286, it being alleged, that according to the custom of a certain manor, copyhold lands holden thereof could not be surrendered to the use of the will of the testator, and were not devisable by virtue of any custom subsisting in such manor; Lord Thurlow said, that it was totally impossible to say that a copyhold surrendered to the use of a will should not pass thereby; and therefore he must declare the custom of such manor (if there were such an one) to be bad. *Et vide Church v. Mundy*, 15 Ves. 404.

It is stated, 2 Brown, 58, that a will received by the Ecclesiastical Court will revive the surrender of copyholds; and now, since the statute 55 Geo. III. (after mentioned) they will pass by such will, although they have not been surrendered; but if surrendered to the use of a will, the terms of the surrender must be complied with. *Godwin v. Kilsha*, Anbl. 684. *Doe dem. Cook & Ux. v. Danvers*, 7 East, 298. Where the surrenderer makes a will, and appoints the uses, the law says, the lands pass by the surrender, and the will is only directory of the uses. But though the lands are so appointed, if the appointee die in the lifetime of the testator, it was never thought he could take the benefit of it, which must have often happened, considering the number of such wills; yet it was never contended it would vest in the appointee, dying in the lifetime of the testator, because the act was not complete, it being no will till his death; and consequently at the time it should vest, there was no person to take. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61.

It was held formerly, that where there was a general devise

rect my executors, out of my personal estate to pay and defray the fines and fees upon the

of lands, and no surrender of the copyhold lands to the use of the will, they did not pass by the will, especially where there were other words answering the intention of the testator; for copyhold lands are not properly the subject of a devise, as they pass by the surrender, and not by the will. *Hawkins v. Leigh*, 1 Atk. 387.

But where copyhold lands are surrendered to the use of a will, whether they will pass by a devise of land in general terms, although there may be freeholds to answer such devise. *Tendril v. Smith*, 2 Atk. 85. *Byas v. Byas*, 2 Ves. 164. And where a man devises all his real and personal estate in possession and reversion to a wife or child, and has no other real estate but the copyhold, it will pass by the general words; but this depends upon the circumstances of the case. Where the words used were "as to all my temporal estate, I dispose of the same as follows," it was held, that the testator had shewn a plain intention to dispose of his whole estate, and that the subsequent words, devising "all his estate, real and personal, in possession or reversion," were general enough to carry the copyhold; a leasehold estate for years could not satisfy the word 'real' in the will, for it is called a chattel real only, as it is derived out of the real estate. *Smith v. Baker*, 1 Atk. 385. *Acherley v. Vernon*, 9 Mod. 68. The words being sufficiently comprehensive, a question may then arise, whether it appears to be the intention of the testator that the copyhold should pass; and such intention will be gathered from the particular circumstances of each case. In *Car v. Ellissen*, 3 Atk. 78, it was said, the testator could hardly be presumed to intend to sever the copyhold, which came at the same time with the freehold; and that to construe it otherwise, would be to dismember the estate, which could never be meant, when he devises them to the same trustees as were under his marriage settlement. But although copyholds are surrendered to the use of the will, yet if the words are not sufficient to take them in, they will not pass. *Goodwyn v. Goodwyn*, 1 Ves. 226. And if a person, having several copyhold estates, make his will, and de-

## admission of my son to the copyhold or custo-

copyholds. vise "all his copyhold tenements," or "all his real estate" generally, and then purchases other copyholds, and afterwards surrenders all his copyhold tenements to the use of his will; the copyhold lands which were purchased after the execution of the will, though before the surrender, will not pass. Thus, where a testator recited in his will that he was seised of a copyhold estate, (whereas in fact he was not) and devised all his real estate, &c. and afterwards purchased a copyhold estate, and surrendered it to such uses as "I by my will shall appoint;" he afterwards died without making any other will. Lord Hardwick held, that the copyhold did not pass by the will—1st, because the surrender was to a *future appointment*; 2dly, because the words of the will did not extend to an after-purchased copyhold, but only to such of which the testator was seised at the time of making it. *Ward v. Ward*, Ambl. 299. And see 1 T. R. 435. But the surrender of copyholds, which have been purchased after the testator has made his will, may be so framed as to refer to the will, and to pass by a devise therein, as if they are surrendered to the uses *declared*, or to be declared by will. *Heylyn v. Heylyn*, Cowp. 130. In which case the testator having made his will, and purchased other copyhold lands, surrendered them to the uses declared, or to be declared in and by his last will and testament: Lord Mansfield observed, that the construction of the surrender would be better understood by stating the nature of a republication of a will. When a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the date of the republication, just the same as if he had had such additional property at the time of making his will. Therefore, if one devises lands by the name of B., C., and D., and purchases new lands, and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands, B., C., and D. But if the testator in his will says, I give *all* my real estate; a republication will affect such newly purchased lands, because it is then the same as if the testator had made a new will. Apply this rule to the case of a surrender, and I am of opinion that the surrenderor may express himself so

mary estates, to which they will become entitled to be admitted on my death.

as to make it relate to a will actually made, and that the copyhold lands so surrendered will pass by it. Suppose a testator seised of copyhold lands makes his will, without a surrender; if he afterwards surrenders them to the use of his will, such surrender will clearly make his will good, and is effectual to pass them. It was accordingly decreed, that the newly purchased copyhold lands should pass to the same uses as declared of the other lands mentioned in the will. And see *Doe dem. Pate v. Davy*, 1 Cowp. 158. Copyholds not being within the statute of frauds, Lord Eldon has observed, it may be a question whether many acts are not revocations of a will of copyholds, which would not work a revocation in the case of freehold estates. *Vawser v. Jeffery*, 2 Swanst. 268.

By statute 55 Geo. III. c. 192, it is enacted, "That in all cases where, by the custom of any manor in England or Ireland, any copyhold tenant of such manor may, by his or her last will and testament, dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament; every disposition or charge made or to be made by any such last will and testament by any person who shall die after the passing of that act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual, to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will."

The statute was passed to prevent the inconveniences found to Surrender arise from the necessity of making surrenders a mere matter of form and circumstance. No inconvenience has been found to arise from the necessity of requiring a surrender, in order to give effect to the will of a *feme covert*; on the contrary, the policy of *covert*. The law requires a separate examination of a married woman when she surrenders to the use of her will; and the object is to prevent the wife from making an improvident will under the con-

Life estates  
given by  
will to be  
taken in lieu  
of portions  
provided by  
marriage  
settlement.

**XCIX.** Provided always, and I do hereby declare, that the life estate which I have hereinbefore given to each of my said children respectively by my said wife, shall, when he or she shall respectively become entitled to the same in possession, be accepted and taken by him or her respectively in lieu and full satisfaction of the portion provided for him or her by the hereinbefore recited indenture of release

trol of her husband. It has therefore been decided, that the separate examination of a *feme covert* is still necessary to give effect to the will of a *feme covert*, and consequently a surrender to the use of her will must be previously made. *Doe dem. Nethercote v. Bartle*, 1 Dowl. & Ryl. 81.

Before the passing of this act, courts of equity supplied the surrender of a copyhold in favour of three descriptions of persons; namely, of the creditors, (including purchasers for valuable consideration,) of the wife, and of the children of the testator. Watk. Copyhold. 1 vol. 133. *Byas v. Byas*, 2 Ves. 164. *Tudor v. Anson*, 2 Ves. 582. *Goodwyn v. Goodwyn*, 1 Ves. 226. *Smith v. Baker*, 1 Atk. 385. But the effect of a surrender would not thus be supplied in favour of creditors, if there were both freehold and copyhold estates devised for the payment of debts, and the freehold was sufficient for the purpose. *Ithell v. Beane*, 1 Ves. 215. And see *Drake v. Robinson*, 1 P. Wms. 443. Nor would equity supply the want of a surrender in favour of a wife and children against the heir, though not provided for by the testator, if the heir would thereby be totally unprovided for. *Pike v. White*, 3 Bro. Ch. Rep. 286. *Kettle v. Townsend*, 1 Salk. 187. *Hawkins v. Leigh*, 1 Atk. 387. Otherwise if the heir would be left provided for. *Banks v. Denshaw*, 3 Atk. 584. See 1 P. Wms. 60, note 1. Watk. Copyhold. 1 vol. 133, *et seq.* For the numerous contradictory decisions as to the point, whether a surrender could or could not be supplied for grandchildren, see Watk. Copyhold. 1 vol. 136, *et seq.*

and settlement: But nothing herein contained shall extend or be construed to extend to oblige the child for the time being entitled to such life estate in possession, to refund any interest or maintenance money in respect of such portion.

C. Provided always, and I do hereby direct, Trustees to receive rents during minorities, under this my will to the actual possession, or to the receipt of the rents and profits of the manors, messuages, hereditaments, and premises, hereinbefore devised, or any part thereof, shall be under the age of twenty-one years, and unmarried, the said trustees, and the survivor of them, and the executors or administrators of such survivor, shall, so long as the person entitled as aforesaid shall be under the age of twenty-one years, and unmarried, [but without prejudice to the said term of years hereinbefore created, and to the trusts hereinafter declared concerning the same, and also without prejudice to the powers herein-after contained, and the uses and estates to be created thereby,] receive and take the rents and profits of the said manors, messuages, hereditaments, and premises, or of such part thereof, to which such person shall be entitled, and apply a competent part for his or her main-  
tence and education, and in paying the sala-  
ries of the stewards or agents to be appointed,  
and apply  
competent  
part for  
main-  
tance, &c.

and to place as hereinafter is mentioned; and invest the residue in the funds, &c. residue in the names or name of the said [trustees], or the survivor of them, or the executors, or administrators of such survivor, in the Parliamentary Stocks or Public Funds of Great Britain, or at interest on government or real securities, in England or Wales, so that the same may accumulate in the nature of compound interest, Provided that such accumulation take place during the minorities of such persons only who shall be living at the time of my decease, or then, *en ventre sa mere* [See note *Accumulation*]. And at the end of such period of accumulation, or sooner, if the said trustees or trustee should think proper, shall call in and convert the said accumulated fund into money, and apply the same in or towards satisfaction and discharge of the incumbrances which at the time of my decease shall or may affect the hereditaments, from the rents and profits of which such accumulations shall have proceeded, and of the principal sums, (if any), which shall then affect the same hereditaments, by virtue of any charge made thereon by this my will, or to be made thereon in pursuance of any of the powers contained in this my will: And shall lay out and invest the residue of the said money (if any) in the purchase of freehold or copyhold estates, to be situate in England or Wales; and shall settle the estates so to be purchased, same to the To the uses and in the manner, to and in which

*to accumulate,*

*and to convert same into money,*

*and apply same in discharge of incumbrances,*

*and to lay out residue in purchase of estates,*

*and to settle same to the*

I have by this my will devised the hereditaments, before mentioned uses. from the rents and profits of which such accumulations shall have proceeded, or as near thereto as the deaths of parties, and other circumstances, will then admit of: But if any such investment shall be made during the continuance of the period of accumulation, the rents and profits of the estates so to be purchased shall, till the end of the period of accumulation be accumulated in the manner and for the purposes hereinbefore mentioned.

CL Provided always, and I do hereby declare, that it shall be lawful for the said [trustees], and the survivor of them, and the executors and administrators of such survivor, during such time as any person for the time being entitled under this my will to the actual possession, or to the receipt of the rents and profits of the manors, messuages, hereditaments, and premises hereinbefore devised, or any part thereof, shall be under the age of twenty-one years, and unmarried, to appoint one or more steward or stewards, agent or agents, for the purpose of managing, and of collecting and getting in the rents and profits of the said manors, messuages, hereditaments, and premises hereinbefore devised, or that part thereof to which such person shall be entitled, as aforesaid: And to allow to the steward or stewards, agent or agents, to be so appointed as afore-

Power for  
trustees during mi-  
norities of  
*cestuis que  
use, to ap-  
point stew-  
ards, &c.*

said, such salary or salaries, as to the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, shall seem proper.

Declaration  
of trusts of  
term,

for raising  
money for  
payment of  
debts, &c.

and for fur-  
ther secur-  
ing annuity,

**CII.** And I do hereby declare, that the said manors, messuages, hereditaments, and premises, are hereinbefore limited To the use of the said [*trustees*], their executors, administrators, and assigns, for the said term of 500 years, Upon the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same; that is to say, Upon trust [by sale or mortgage, &c. to raise money for payment of debts, &c. see *Clause XV.*]: And subject to the trusts aforesaid, Upon this further trust, that if the said annual sum of £ , hereinbefore limited to my said wife and her assigns, during her life, or any part thereof, shall be in arrear for the space of sixty days next after any of the days hereinbefore appointed for payment thereof, then and so often the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, do and shall, &c. (see *Clause L.*): And subject to the trusts aforesaid, Upon this further trust, that they the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, by sale or mortgage of the same manors, messuages, hereditaments, and pre-

mises, or any of them, or any part thereof, for the whole or any part of the said term of years, or by such other ways and means as they the said [trustees], or the survivor of them, or the executors, administrators, or assigns of such survivor, shall think proper, levy and raise for the portion or portions of all and every my child and children by my said wife (other than or besides the child who under this of testator. my will shall, for the time being, be entitled to the same manors, messuages, hereditaments, and premises, in remainder, immediately expectant on the determination of the same term of      years,) who being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain the age of twenty-one years, or marry under that age, the sums of money hereinafter mentioned ; (that is to say;) if there shall be one such child only, (other than or besides the child so for the time being entitled, as aforesaid,) the sum of £      for his or her portion; and if there shall be two such children only, (other than or besides the child so for the time being entitled, as aforesaid,) the sum of £      for their portions; and if there shall be three such children only, (other than or besides the child so for the time being entitled, as aforesaid,) the sum of £      for their portions; and if there shall be four such children only, (other than or besides the child so for the time being entitled,

and for raising portions  
for children  
according to  
the number  
of children.

as aforesaid,) the sum of £      for their portions; and if there shall be five such children only, (other than or besides the child so far the time being entitled, as aforesaid,) the sum of £      for their portions; and if there shall be six or more such children, (other than or besides the child so far the time being entitled, as aforesaid,) the sum of £      for their portions

Such portions to be in lieu of portions provided by marriage settlement of testator. And I do hereby declare, that the portions hereinbefore provided for such of my said children as aforesaid, are intended to be, and shall be, accepted by them respectively, in lieu and full satisfaction of the portions provided for them by the hereinbefore recited indenture of release and settlement: But nothing herein contained shall extend, or be construed to extend, to oblige such children to refund any interest or maintenance money for or in respect of such portions: Provided always, and I do hereby declare, that the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, after my decease, with and out of the rents and profits of the manors, messuages, hereditaments, and premises comprised in the said term of      years, levy, raise, and apply

Power for trustees to raise out of the rents of the premises comprised in the term, for the maintenance and education of such of my children for whom it is my intention to provide a portion or portions as aforesaid, in the meantime, and until his, her, or their portion or respective portions shall become payable,

such yearly sum or sums, not exceeding the sum until portions be payable, which the interest of the expectant portion or yearly sums portions intended to be hereby provided for such not exceeding the in-child or children respectively, would amount interest of to after the rate of (£ ) for every £100 by each expectant portion. the year, as to them the said [trustees], or the survivor of them, or the executors, administrators, or assigns of such survivor, shall seem sufficient: Provided always, and I do hereby And also to further declare, that it shall be lawful for the raise, said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, at any time or times after my decease, by the several ways and means hereinbefore mentioned, or any of them, to levy and raise for the advancement or preferment for the advancement in the world of any of my sons, (other than or of younger besides the son for the time being entitled, as sons, aforesaid,) any sum or sums which the said trustees or trustee shall think proper, not exceeding in the whole, for each of such sons, the sum of £ ; and such sum or sums shall a limited sum. be taken in part satisfaction of the portion or portions intended to be hereby provided for such son or sons as aforesaid, And shall be applied in the advancement or preferment of such son or sons, notwithstanding his or their portion or portions shall not then have become vested or payable.

CIII. And I do hereby further declare, that Further declaration of  
R

the said manors, hereditaments, and premises  
 are hereinbefore limited to the use of the said  
 [trustees], their executors, administrators, and  
 assigns, for the said term of      years, Upon  
 this further trust, that the said [trustees], and  
 the survivor of them, and the executors, ad-  
 ministrators, and assigns of such survivor, Do  
 and shall until the sum of £      , of lawful mo-  
 ney of Great Britain, shall be raised by the  
 sale of timber and other trees, as hereinafter  
 is mentioned, mark, allot, and set out, or cause  
 to be marked, allotted, and set out, such tim-  
 ber and other trees to be felled, and cut down  
 from off the said manors, hereditaments, and  
 premises, as shall from time to time be want-  
 ed for the new building, repairing, or amending  
 all or any of the mansion houses, messuages,  
 farm houses, out-houses, edifices, and buildings  
 now standing and being, or hereafter to be  
 erected, and to be standing and being upon any  
 part or parts of the said manors, heredita-  
 ments, and premises: And do and shall permit  
 the same to be felled, cut down, and used by  
 the person or persons who under this my will  
 shall, for the time being, be entitled to the man-  
 ors, hereditaments, and premises in remain-  
 der, immediately expectant on the determina-  
 tion of the said term of      years, or by his  
 or their agents, workmen or tenants, for the  
 new building, reparation, or amendment of such  
 mansion houses, messuages, farm houses, out-

trusts of  
 term,  
 o authorise  
 trustees to  
 cut down  
 timber  
 for repairing  
 buildings,  
 and to per-  
 mit same to  
 be cut down  
 by persons  
 entitled in  
 remainder;

houses, edifices, and buildings, so that the same may from time to time be supported and kept in good and tenantable repair: And upon this further trust, that until the said sum of £      shall be raised by the sale of timber and also and other trees, as hereinafter is mentioned, the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall (but subject and without prejudice to the trust hereinbefore declared for allotting, setting out, felling, and cutting down timber and other trees, for the purposes aforesaid) from time to time, when and as they or he shall think proper, fell and cut down, or cause to be felled and cut down, all such timber and other trees, as shall be at their full growth, or growth and height of improvement, or in a state of decay, or which ought to be felled and cut down for the improvement of other timber and other trees; and do and shall sell and dispose of the timber and other trees, which shall be so felled and cut down, to any person or persons who shall be willing to purchase the same, for such price or prices as can be reasonably had or gotten for the same: And do and shall apply the monies to arise from the sale thereof towards satisfaction of the incumbrances which at the time of my decease shall affect all or any of the manors, messuages, hereditaments, and premises hereinbefore devised; and also

to cut down trees of full growth, or in a state of decay,  
and to sell same, from in payment of incumbrances and charges affecting the premises,

in or towards the satisfaction and discharge of the principal sums (if any) which shall then affect all or any of the same manors, messuages, hereditaments, and premises, by virtue of any charge made thereon by this my will, or to be made thereon in pursuance of any of the powers contained in this my will: And do and shall apply and dispose of the residue (if any) of the same monies, to the same purposes, and in the same manner, to and in which I have hereinafter directed the remainder of the monies, to arise from my arrears of rent, and the residue of my personal estate and effects, to be applied and disposed of.

*and apply  
residue as  
personal es-  
tate.*

*Declaration,  
that subject  
to the term,  
the rents-  
shall be re-  
ceived by  
the persons  
next in re-  
mainder.*

CIV. Provided always, and I do hereby declare, that the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall (subject and without prejudice to the trusts aforesaid) from time to time permit the rents and profits of the said manors, messuages, hereditaments, and premises, or so much of the said rents and profits as shall remain after answering the trusts aforesaid, to be received by the person or persons who for the time being shall be entitled to the same manors, messuages, hereditaments, and premises in remainder, immediately expectant upon the determination of the same term.

CV. Provided always, and I do hereby further declare, that when all the trusts of the said term of              years shall have been performed or become unnecessary, or incapable of taking effect, and the costs incurred by the said [*trustees*], and each of them, and their executors, administrators, and assigns, in the execution of such trusts, shall have been fully satisfied (which costs I do hereby authorise and empower them and him to raise and retain), the said term of              years in the said manors, messuages, hereditaments, and premises hereinbefore devised, or in so much thereof, as shall not have been sold or mortgaged for the purposes aforesaid, shall cease\*, determine, and be void.\*

\* An estate for a term of years is said to affect only the possession, and not the seisin of the land; for *seisin* is a word of art, and in pleading is only applied to a freehold, as *possessed*, for distinction sake, is to a chattel real or personality. A man is not actually possessed of a lease for years until entry. But where terms of years are created by way of limitation of use, such terms vest immediately, or are executed according to the interest in them by virtue of the statute of uses; so that entry in such cases is not necessary. Though a devise by will be considered as operating under the statute of uses, or merely by virtue of the statute of wills, yet it has never been considered, that entry is required by the devisees in order to vest in them a term of years created by will; as an estate for a term of years only affects the possession, and not the seisin of the land; the seisin of the owner of the fee subsists, notwithstanding the possession of the termor, and is not in any manner disturbed thereby; the possession of the termor does not prevent the possession of the freehold and inheritance. The advantage of creat-

**CVI.** Provided always, and I do hereby declare, that it shall be lawful for my said son , and for every other male person hereby made tenant for life of the manors, hereditaments,

Terms of years. ing terms of years, for the purpose of raising portions or jointures, or for raising money for payment of debts, is therefore obvious; at law, every term of years in a trustee is a term in gross, and severed from the inheritance, and the persons entitled to the beneficial interest, have a right to call on the trustees for the rents and profits of the lands comprised in the term. *Doe v. Pegge*, 1 T. R. 765.

Proviso for cesser. When the purposes for which such terms may have been created are fully satisfied, they will still continue to subsist, unless a special direction or proviso for cesser be contained in the will or instrument creating the same; but the owners of the inheritance will be considered as entitled to the benefit of the terms, and also to an assignment of them to attend the inheritance.

Terms attendant on the inheritance. As to the nature of a term assigned to attend the inheritance, it has been said by Lord Hardwicke, to be the creature of a court of equity, partly to protect real estates, and partly to keep them in the right channel. The court of Chancery considers terms in gross, and terms to attend the inheritance, in a different manner, though it is not so at law; for there they are considered in the same light. Equity always considers who has the right in conscience to the land, and on that ground makes one man a trustee for another; and as the common law allows the possession of the termor to be possession of the owner of the freehold, the court of Chancery has said, that where the tenant for years is but a trustee for the owner of the inheritance, he shall not keep out his *cestui que trust*, nor obstruct him in doing any acts of ownership, or in making any assurances of his estate, and though the legal interest during the term is in the trustee, yet the owner of the fee is in equity entitled to all the benefit or advantage of the term during its continuance.

Terms of years disposable by will. Terms for years falling within the description of personal estate, are disposable by will accordingly; but this must be understood with some distinction. Here, if they are terms not in gross, but vested in trustees to attend the inheritance, they so follow the nature of the

and premises hereinbefore devised, either before, or when, by virtue of this my will, he shall be in the actual possession of the said manors and hereditaments, and entitled to the rents

latter, that if the owner devises the land *generally* by a will not so attested as to pass the inheritance, not even the *trust* of the term will pass, because the term is attendant on his part of the inheritance. *Whitchurch v. Whitchurch*, 2 P. Wms. 236. Also, as to terms in *gross*, though a testator being possessed of such, may *transmit* them by the same unsolemn kind of will as other personality, yet he cannot *create* them by will, without observing all the forms essential to a devise of real estate, because the interest in right of which the testator creates the term is *real* estate, and creating the term is a partial devise of it. Co. Litt. 111 b. Hargr. n. 3. Lord Eldon, in the case of *Belt v. Mitchelson & Belt*, held it clear, that as to real estate, whatever the owner of the inheritance had not manifestly departed with, still remained with him or his heir, whether it were the estate itself or a term which had been carved out of it. His Lordship allowed, that as to a term in *gross* it might be otherwise, and the doctrine in *Goffe v. Hayward*, 1 Rolle, 247 and 368, seemed to support it. The nature of terms in *gross*, however, being mere chattel interests, was altogether different from the nature of terms which had been carved out of an inheritance to answer particular purposes. In such instances, the courts of equity viewed the term as created for the particular purposes, and for no other; considering the term as attendant on the inheritance as to every thing beyond them. All such portions of the inheritance and trusts relative to an inheritance as are not manifestly given away or held to be so from the very nature and necessity of the thing, remain still the propriety of its owner or of his heir. The consequence of which is, that every term created out of an inheritance, is considered in equity as attendant on it, when the precise purposes for which it was created have been answered, in the same manner as if it had been so expressly declared. *Belt's Supplement to Ves. senr. Reports*, 231.

and profits thereof, and either before or after marriage, by any deed or deeds, sealed and delivered by him respectively in the presence of and attested by two or more witnesses, or by his last will in writing, or any codicil thereto in writing, and respectively signed and published by him respectively in the presence of and attested by three or more witnesses (but subject to the uses or estates antecedent to the use or estate of the person for the time being making such charge, and the powers annexed to such antecedent uses or estates, and also subject to the uses or estates to be limited in exercise of the said powers), to charge the said manors, messuages, hereditaments, and premises, or any part thereof, with the payment of any annual sum not exceeding £ , to any woman whom he shall marry, for her life, for her jointure, to be payable quarterly, or half-yearly, and without any deduction whatsoever, with usual powers of distress and entry, and detention of possession, and perception of rents

And to appoint the premises so charged for securing the payment of the jointures. And also (subject as aforesaid) to appoint the hereditaments and premises so to be charged to any person or persons, for any term of years, upon the usual trusts for securing the payment of the annual sums so to be charged, so that every such term of years be made to cease on payment of the annual sum thereby respectively secured, and all expenses to be incurred by the non-payment thereof re-

spectively. Provided always, and I do hereby declare, that while the said annual sum of £ , hereby limited to the use of my said wife , shall be payable, the said manors, messuages, hereditaments, and premises, shall not, by virtue of the aforesaid power of jointuring, be at any one time liable to the payment of more than the annual sum of £ , for jointures: and after the said annual sum of £ , shall cease to be payable, the said manors, messuages, hereditaments, and premises shall not, by virtue of the said power of jointuring, be at any one time liable to the payment of more than the annual sum of £ , for jointures, as aforesaid.

CVII. Provided always, and I do hereby declare, that it shall be lawful for my said son , and for every other person, both male and female, hereby made tenant for life of the manors, messuages, hereditaments, and premises hereinbefore devised, either before or when, by virtue of this my will, he or she shall be in the actual possession of the said manors, messuages, hereditaments, and premises, or entitled to the rents and profits thereof, and either before or after marriage, by any deed or deeds, sealed and delivered by him or her respectively in the presence of and attested by two or more credible witnesses, or by his or

her last will in writing, or any codicil thereto in writing, respectively signed or published by him or her, in the presence of and attested by three or more credible witnesses (but subject to the uses or estates antecedent to the use or estate of the person for the time being making such charge, and the powers annexed to such antecedent uses or estates, and also subject to the uses or estates to be limited in exercise of the said powers), to charge the said manors, messuages, hereditaments, and premises, or any part thereof, with any sum or sums of money for the portion or portions of any child or children, of his or her body, (other than or besides an eldest or only child, for the time being entitled to the said manors, messuages, hereditaments, and premises, for an estate in tail male, or for life, in possession or in remainder, immediately expectant on the decease of his parent exercising this present power), not exceeding in the whole the sum of £ . The said sum of £ , or such less sum as shall be charged under this present power, to be vested in, and to be paid to or shared between or amongst all and every such children and child, or any one or more of them, exclusively of the others or other of them, at such age or time, or respective ages or times; and if more than one, in such proportions, and upon such terms and conditions, and in such manner, as the person for the time being exercising the said power,

not exceeding a specified sum.

And to be vested and payable as the person exercising the power shall appoint.

shall think proper, and shall, by any deed or deeds so sealed and delivered, and attested as aforesaid, or by his or her last will in writing, or any codicil thereto in writing, so signed and published, and attested as aforesaid, appoint.

And also (but subject as aforesaid) to appoint And to ap-  
all or any part of the hereditaments and pre- point the  
mises so to be charged as last hereinbefore is for terms of  
mentioned, to any person or persons, for any premises  
term or terms of years, without impeachment  
of waste; Upon trust, to raise the money so to  
be charged by way of mortgage, but so that  
the estate or estates so to be appointed, be  
made to cease, or be made redeemable, on full  
payment of the money so to be charged, and  
the interest thereof, by the person or persons  
for the time being entitled to the freehold or  
inheritance of the hereditaments and premises  
so to be appointed. Provided always, and I Limit of  
do hereby further declare, that the manors, sum to be  
messuages, hereditaments, and premises here- raised.  
inbefore devised, shall not, by virtue of the  
aforesaid powers of charging with portions, or  
either of them, at any one time, be liable to the  
payment of more than the principal sum of  
£ , for portions.

**CVIII.** And I declare my will and mind to If person  
be, that if any person hereby made, or directed made tenant  
to be made, tenant in tail male of my estates in tail be  
hereby devised, or directed to be purchased, living at  
testator's decease, the

estate tail to shall be living at my decease, or born in due time after, then, and in every such case, the estate or estates in tail male, hereby devised to that person, shall cease or not have effect:

and in lieu, testator de-vises pre-mises to him for life, with re-mainder to trustees to preserve contingent remainders. Remainder to his sons according to seniority, in tail.

And in lieu or place of the same, I give and de-vise the estates, of which he would have been tenant in tail male under this my will, to that person and his assigns, during his life, with re-mainder to the said [trustees] and their heirs, during his life, in trust for him, and to preserve contingent remainders, with remainder to his sons, severally and successively, according to their respective seniorities in tail male.

Shifting clause.

CIX. Provided always, and I do hereby de-clare my will and mind to be, that if in conse-quence of the decease and failure of issue male of the said P. D., the said L. B. or his issue male, shall become actually entitled to the bar-ony of , or immediately inheritable to the same after the decease of the said P. D., and the said W , or any issue male of his body, shall be then living, then and in such case the said estates, hereby limited or provid-ed to or for the said L. B. and his respective issue male, shall absolutely cease\*. But if the

As to shift-ing uses.

\* The various necessities of mankind induced the judges very soon to depart from the rigour and simplicity of the rules of the common law, and to decide that a fee may be limited, by way of use, to take effect after a fee; because, though that was forbid-den by the common law, in favour of the lord's escheat, yet when

same shall so cease in consequence of this proviso, and the said W. shall afterwards depart

the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were, before the statute, permitted to be limited in equity, and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held, that a use, though executed, may change from one to another, by circumstances *ex post facto*. *Harwell v. Lucas*, Mod. 99. Dyer, 314 b. pl. 96. Lord Bacon, in the reading upon the statute of uses, p. 61, observes, " If I once limit the whole fee-simple of the use out of land, and part thereof to a person uncertain, it shall never return to the feoffor by way of fraction of the use; but look how it should have gone unto the feoffor—If I begin with a contingent use, so it shall go to the remainder; if I entail a contingent use, both estates are alike subject to the contingent use when it falleth; as when I make a feoffment in fee to the use of my wife for life, the remainder to my first begotten son, I having no son at that time; the remainder to my brother and his heirs; if my wife die before I have any son, the use shall not be in me, but in my brother. And yet, if I marry again, and have a son, it shall divest from my brother and be in my son, which is the skipping they talk so much of." Where lands were conveyed to trustees and their heirs, to the use of husband for life; remainder to wife for life, for her jointure; remainder to trustees, to preserve contingent remainders; remainder to the first and other sons of the marriage successively, in tail male; remainder to the daughters of the marriage, in tail; with the ultimate remainder to the husband and his heirs for ever, subject to a proviso, that if it should happen that no issue of the said marriage should be living at the decease of the survivor of them, and that if the heirs of the said wife should, within twelve months after the decease of the survivor of the said husband and wife dying without issue as aforesaid, pay to the heirs or assigns of the said husband the sum of 4000*l.*, that then the remainder in fee-simple, so limited to the said husband and his heirs, should cease, and the premises should remain to the use of the right heirs of the said wife for ever.

this life, and there shall be a failure of issue male of his body, then, and in that case, the

This was held to be a good shifting use. *Sir Evan Lloyd v. Carew*, Prec. Ch. 72. And the decree was affirmed in the House of Lords. Show. Parl. Ca. 137. It was, however, in the last-mentioned case strongly insisted, that the period on which the shifting use was to take effect, namely, at the expiration of twelve months after two lives in being, was too remote, as not being confined to lives in being; and that if the extra term of one year was allowed, one thousand years might as well be given. But the proviso was by the House of Lords decreed to be valid; and it is now fully settled, that as a tenant in tail may, by common recovery, bar all limitations, subsequent or collateral, to his estate, and defeat the shifting use, there is no necessity to confine the period during which the shifting use may take effect, for all danger of a perpetuity ceases. Thus, where a testator devised his real estates to trustees in trust, to receive the rents and profits, and, subject to certain charges, to pay the surplus to E. N. for sixty years, if he should so long live; and from and after the expiration thereof, or of the decease of the said E. N., to the use of the first and other sons of E. N. and the heirs of their bodies, severally and successively; with a proviso that if the said E. N., or the heirs of his body, should become seized of the Trafford estate, then that the trusts thereby declared for the use of the persons who should so become seized should cease and determine, and be absolutely void; and that then the trustees should stand seized to the use of the person next in remainder under his will, in the same manner as he or she would be entitled, if the person so seized of the Trafford estate was or were actually dead. It was held, that on the Trafford estate coming to E. N., the estate which he took under the will ceased, and vested in his eldest son, being the next person in remainder. Lord Kenyon observed, that there was no doubt as to the validity of the proviso: several estates were held under similar limitations. No rule of law was contradicted by it; and if no recovery was suffered, it might take place at any distance of time: that it might as well be said, that an estate tail was an illegal estate, because it may

said manors and other hereditaments shall revert to the said L. B. and the said respective endure for ever. *Nicholls v. Sheffield*, 2 Bro. Ch. Ca. 215. Where a testator devised lands to trustees in fee (subject to the uses of a term of one thousand years), to the use of W. for life, subject to the proviso after mentioned; remainder to trustees, to preserve contingent uses; remainder to the use of his first and other sons successively, in tail male, subject to the same proviso, &c.; remainder to the use of the devisor's grand-daughter C. H. for life, subject to the proviso, &c.; remainder to trustees, to preserve contingent uses; remainder to the use of her first son (the plaintiff), in tail male, with other remainders over; "provided if W. H., or either of the persons to whom the estate was limited, should become Earl of Errol, the use limited to such person and his issue male should cease and be void, as if such person were dead, without issue of his body." It was held, that on the death of his eldest brother without issue, by which event W. H. became Earl of Errol, the person next in remainder (supposing W. H. had, in fact, died without issue) was entitled, under the will, to take an estate in tail male in possession, subject to the trusts of the term of one thousand years. *Carr v. Earl of Errol*, 6 East, 58. *Doe dem. Heneage v. Heneage*, 4 T. R. 13. *Stanley v. Stanley*, 16 Ves. 491.

It is now, therefore, fully settled, that provisoes shifting an estate from a person on his accession to another estate are valid, by a limitation of a shifting or secondary use; and that such provisoes may (if annexed to, or dependant on an estate tail) be expressed generally, and need not be confined to an union of the estates within any particular period of time; as if any of the younger sons, or of the heirs male of their bodies, shall come into possession of certain property, the estate then enjoyed by such person shall shift from that person, and go to those next entitled in remainder; because, as before mentioned, the tenant in tail may, by suffering a common recovery, bar such shifting or secondary uses.

The foregoing observations also apply to the proviso in the text, directing that if the person to whom an estate is limited

issue male of his body, for the estates, and in the manner in which the same is hereinbefore devised to them respectively.

**As to the proviso to take the name and use the arms of testator.** shall neglect or refuse to take the name, and use the arms of the settler, the estate shall cease and determine, as if the person so neglecting or refusing were dead without issue, and that the estate shall go to the person next entitled in remainder.

The great nicety and accuracy of expression necessary to be used in the penning of these clauses, are fully shewn in Mr. Butler's note, Co. Litt. 327 a. A short statement of one or two cases may further elucidate this subject. In *Gulliver v. Ashby*, 4 Burr. 1930, a testator declares that a devise was expressly "upon this condition, that whenever it should happen that the estates should descend or come to any of the persons before named in the will, that he or they should change their surnames, and take upon them and their heirs the surname of Wykes only, and not otherwise;" but in this proviso there was no devise over. Ambrose Saunders, who was the then sole heir at law of the testator, became vouchee in a common recovery, but never changed his name of Saunders, nor took upon him the surname of Wykes. The lessor of the plaintiff entered for breach of the proviso; and it was argued, that his title accrued before the common recovery was suffered, on the ground that the proviso operated as a conditional limitation, and not as a condition. The court held, that this was not a condition precedent, and also that it was not a conditional limitation; and, therefore, it was held, that the clause did not contain such a limitation as would carry the estate over to the next remainder-man upon breach of the condition enjoined. So, where a testator directed and appointed that each and every person claiming the estates devised by his will not bearing the surname of Luscombe, should take and use the same instead of his own surname; and should, within three years then next after, get and procure his and their name or names to be altered, and changed to the testator's name of Luscombe, by act or acts of parliament, or some other effectual way for that purpose; and should, for ever after, have, use, and bear on all occasions the surname of Luscombe; and in case

**CX. Provided always, that in case, by virtue of any of the limitations hereinbefore contained,**

of negligence in this respect, the limitation to the defaulter was to become absolutely void, and go over to the next remainderman complying with the proviso. The first devisee took upon himself the name of Luscombe, and continued to use it, but he never obtained any act of parliament authorising him to change his name. The court of King's Bench considered that he had undoubtedly complied with the words of the direction contained in the clause, whereby the lands were given to him, and had in substance complied with the desire and intention of the testator, which was, that the person who enjoyed his lands should take and bear his name; for a name assumed by the voluntary act of the young man on his entrance into life, adopted by all who knew him, and by which he is constantly called, becomes for all purposes as much and effectually his name as if he had obtained an act of parliament conferring it upon him. The direction of the testator did not imply the bearing the name by virtue of any particular authority, as if he had said "bearing the name by virtue of an act of parliament or some other authority as effectual;" but the words are general and simple "not bearing the surname of Luscombe." The court considered that as the testator had annexed no express qualification to the words "bearing the surname of Luscombe," and the word "surname" was manifestly not used in this will in its primary and etymological sense, a name inherited from the father; and as a bearing *de facto* answers every useful purpose that could be obtained under the authority of an act of parliament, a bearing *de facto*, though by voluntary assumption, is sufficient to satisfy the general and ordinary meaning of the words "bearing the surname;" and the court could not say with certainty that the testator intended anything more, or meant to use the words in that qualified and restrained sense which must be given to them, in order to bring the party within the description of persons mentioned in the proviso, so as to pronounce that the condition had been broken, and that the estate should pass over to another claimant. *Doe v. Yates and Others*, 1 Dowl. & Ryl. 187. *Doe v. Yates*, 5 Barn. &

tained, the said A., or any issue male of his body, shall become actually entitled to the possession, or to the receipt of the rents and profits of my said estates in the said counties of C. and L., or any other younger son, or any issue male of any such younger son shall be then living, then and in that case the uses hereby limited in my said estates in the counties of S. and H., to the said A. and his issue male, shall absolutely cease. But my will is, that if, by virtue of this proviso, my said estates in the said counties of S. and H. shall have shifted from my said son A., or from his issue male, and there shall afterwards be a failure of issue male of all my younger sons, entitled under the limitations herein contained, then, and in that case, my said estates in the said counties of S. and H., shall return to, and be and remain to, the use of my said son A., for his life, without impeachment of waste; and after his decease, to his sons successively, according to their respective seniorities, in tail male.

Powers of jointuring,  
and of raising portions,  
to change  
with the shifting of the estates.

CXI. And I declare my mind to be, that if, previously to exercising, or becoming entitled to exercise, the aforesaid powers of jointuring and charging with portions, the said A. B., or any other of my said sons, shall become tenant for life in possession of my said estates in the

said county of D., the said powers of charging the said estates in the said county of C. with jointures and portions shall be at an end; and the said A., and my said other sons so respectively becoming entitled as aforesaid, shall have such and the same powers of charging my said estates in the said county of D., with jointures and portions, and with powers, remedies, and terms for years, for securing the same respectively, as are hereinbefore given or limited to them respectively, over my said estates in the said county of C. And if, after having charged my said estate in the county of C., with a jointure or portion, as hereinbefore is mentioned, the said A. or any other of my said sons shall become tenant for life in possession of my said estates in the county of D., then and in that case the jointures and portions which shall have been so charged by them respectively on the said estates in the said county of C., and the powers, remedies, and terms for years, which shall have been provided or created for securing the same, shall absolutely cease and determine, and the said estates in the said county of D. shall be changed with the same. And if the said powers shall not have been exercised to their respective utmost extent, the said A. or my said other sons so respectively becoming entitled as aforesaid, may thereupon exercise over the said estates in the said county of D., the powers of jointuring and charging

to that extent, which, with the amount of the charges to which the said estates in the said county of D. shall have become subject by his aforesaid exercise of his said powers, will make up the full amount of the money he is authorised to charge under the said powers.

Clause en-  
joining per-  
sons to  
whom es-  
tates are li-  
mited in  
strict settle-  
ment, to  
take the  
name, and  
use the arms  
of testator.

CXII. Provided always, and I do hereby declare my will and mind to be, that the person or persons whom the said *Jane B.* [a feme sole tenant for life, with a power to limit a rent charge to her husband for life, with a limitation to trustees and their heirs to preserve contingent remainders; remainder to her sons successively, in tail male; remainder to her daughters, as tenants in common in tail; with cross remainders in tail between them, and several remainders over,] shall marry, and every person who, by virtue of the limitations hereinbefore contained, or of this proviso, shall become entitled to the possession or to the receipt of the rents and profits of the manors and other hereditaments hereby devised, shall and do, within the space of one year next after they respectively shall so marry, or so become entitled to the possession, or to the rents and profits of the said manors and other hereditaments as aforesaid, take upon him and them respectively, and use, in all deeds, letters, accounts, and other writings to or in which they respectively shall be party or parties, or which

they respectively shall sign, the surname of  
only, and take and use no other  
surname, and quarter the arms of      with  
their own respective family arms; and also  
shall and do, within the space of one year next  
after they respectively shall so marry, or so  
become entitled as aforesaid, apply, sue for,  
and endeavour to obtain, an act of parliament,  
or a proper licence from the crown, or take  
such other means as may be requisite or pro-  
per, to enable or authorise him or them re-  
spectively to take and bear the said surname  
and arms; and that in case any such person  
and persons shall refuse or neglect to take such  
surname and arms, and to take or use the steps  
or means which shall be requisite or proper to  
enable and authorise him or them so to do,  
within the said space of one year, then, if the  
person so refusing or neglecting shall be the  
husband of the said *Jane*, the limitation here-  
inbefore contained to the use of the said *Jane*  
shall cease, determine, and be utterly void;  
and any annual sum which, by virtue of the  
power for that purpose hereinbefore given, the  
said *Jane* shall limit and appoint to the use of,  
or in trust for, or for the benefit of such hus-  
band so refusing or neglecting, and the powers,  
or remedies, and terms of years, which she  
shall limit or create for securing the same, shall  
cease, determine, and become utterly void.  
And that, if the person so refusing or neg-

lecting shall be any other than the husband of the said *Jane*, the limitation hereinbefore contained of the said manors and other hereditaments to the use of him or them so refusing or neglecting, shall cease, determine, and become utterly void. And that the same manors and other hereditaments shall, in such case, immediately thereupon devolve to the person next beneficially entitled in remainder, under the limitations hereinbefore contained, in the same manner as if the person or persons whose estate shall so cease, determine, and become void, being tenant or tenants for life, was or were dead; or being tenant or tenants in tail, was or were dead without any issue inheritable under such intail; without prejudice, nevertheless, to any jointure or jointures, portion or portions, annual sum or annual sums of money, lease or leases, or demise or demises, which, previously to such cesser or determination, shall have been granted or demised of, or charged upon, the said manors and other hereditaments hereby devised, or any part thereof, in pursuance of any of the powers given by this my will (except as to any annual sum, and the powers or remedies, and terms of years for securing the same, which shall have been granted, limited, or appointed by the said *Jane* in pursuance of the power herein contained for that purpose). And I do hereby direct, that the cesser or determination of the estate of the

said *Jane*, or of any other tenant for life, by force of the proviso hereinbefore contained, shall not operate to exclude, prevent, or prejudice any of the contingent remainders hereinbefore limited to her, his, or their son or sons, daughter or daughters, or any other person or persons; but that the remainder limited to the said [*trustees*] and their heirs, during the life of the said *Jane*, or such other tenant for life, shall, after such cesser or determination, take effect and continue for preserving such contingent remainders, and giving them effect as they may arise. And that immediately from and after such cesser or determination of such preceding estate for life, and during the suspense and contingency of such then expectant remainder, the said [*trustees*], their heirs and assigns, shall receive, pay, and apply the rents and profits of the said manors and other hereditaments which would belong to such tenant for life, if such cesser or determination had not taken place, unto the person or persons, for the intents and purposes, and in the manner to, for, and in which the same rents and profits would be or would have been payable or applicable respectively, under and by virtue of the limitations and provisoies hereinbefore contained, in case such tenant for life was actually dead; so that, immediately from and after such cesser or determination, the issue of the said *Jane*, or of such other tenant for life, entitled for the time

being, under the limitations aforesaid, to the said manors and other hereditaments in remainder, immediately expectant on the decease of the said *Jane*, or of such other tenant for life, may be entitled to the rents and profits of the said manor and other hereditaments, for his and their own proper use and benefit respectively, during the life of the parent, as if such parent were dead; and that in case no such issue shall be in existence, then during the vacancy or contingency of such issue, the person next entitled for the time being, under the limitations aforesaid, to a vested remainder in the said manors and other hereditaments, expectant on the decease of the said *Jane*, or of such other tenant for life, and failure of such issue of her or his body, shall and may be entitled to the said rents and profits, for her, his, and their proper use and benefit respectively, but without any exclusion of, or prejudice to, the estate, interest, or right of any such issue afterwards coming into existence, but only from the time of the birth of such issue respectively.

Request to  
take the  
name and  
use the arms  
of testator,

without an-  
nexing any  
condition.

CXIII. And I recommend and request that the husband of any daughter who shall become entitled to my said manors and hereditaments for an estate in possession, should take and use the surname, and bear the arms of : But I do not mean to annex any condition to the breach or non-performance of this request

or recommendation. [See Note "Shifting Uses."]

CXIV. And I give and bequeath all the Heir-looms, books which shall be in my library at my mansion house at W——— at the time of my decease, to the said [trustees], their executors, administrators, and assigns, In trust, to permit the same to go and be held, as far as the rules of law and equity will admit, with my said mansion house, as heir-looms\*, for the

\* Heir looms are such goods and personal chattels as, contrary to the nature of chattels, shall go by special custom to the heir heir-looms, along with the inheritance, and not to the executor of the last proprietor. They have been technically styled limbs or members of the inheritance, and are generally such things as cannot be taken away without damaging or dismembering the freehold. Charters and deeds, court rolls, and other evidences of the land, together with the chests in which they are contained, shall pass with the land to the heir, in the nature of heir-looms, and shall not go to the executor. Also by special custom in some places, carriages, utensils, and other household implements, may be heir-looms; but such customs must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, is become a member of the inheritance, and shall thereupon pass to the heir, as chimney pieces, pumps, &c. Between the heir and executor there has not been any relaxation of the ancient law with regard to fixtures, for there is not any reason why the one should be more favoured than the other; the courts would be disposed to assist the heir, in order to prevent the inheritance from being dismembered or disfigured. *Lawton v. Salmon*, 1 Hen. Black. 259 (note). Other personal chattels descend to the heir in the nature of heir-looms; as a mo-

**benefit of the person or persons who, under the devises or trusts hereinbefore expressed**

nument, or tomb-stone in a church, &c. Pews in the church are somewhat of the same nature, which may descend by custom im-memorial (without any ecclesiastical concurrence) from the ancestor to the heir. 2 Blac. Com. 427. If a man be seised of a house, and possessed of divers heir-looms, that by custom have gone with the house from heir to heir, and by his will deviseth away the heir-looms, this devise is void, for the will taketh effect after his death, and by his death the heir-looms, by ancient cus-tom, are vested in the heir, and the law preferreth the custom before the devise. Co. Litt. 18 b. and 185 b. In a preceding note, (p. 137), it is stated as the rule of law respecting the limitation of personal property, that notwithstanding the same may be devised or limited in strict settlement, it will be the absolute property of the first tenant in tail; and the same cannot by any means be rendered unalienable longer than a life or lives in being, and twenty-one years after.

The doctrine as to the transmission of heir-looms will be eluci-dated by a statement of one or two leading cases on the subject. A testator devised all his ~~books~~, pictures, and household goods, of what nature soever, to such male person (when he should attain twenty-one) who should then be entitled to the trust in possession of the real estates thereinbefore devised; and directed, that until such male person should attain twenty-one, the said books, &c. should be kept at Dunton Hall, and be used in the meantime by such male person residing there; the testator declaring it to be his express will and desire that the said books, &c. might, in the nature of heir-looms, go with his said estate, and be used there-with as long as the laws of this realm would permit. It was on the one hand contended, that by the penning of this clause, and particularly by the operation of the latter words, the books, &c. were to go as heir-looms as far as by law they might. But it was objected, that the clause ought not to have this large con-struction, and that the articles of property ~~should~~ not go in suc-cession as heir-looms from person to person, but should vest in the first taker, whether tenant for life or tenant in tail, who

and contained, shall be the possessors of the same for the time being; but so that, for the

should have the absolute property at twenty-one. Lord Hardwicke held, that the first words must be construed as a disposition only of the use, until some person who was entitled to the inheritance should come into possession by attaining twenty-one; and observed, that it had been objected that the testator had distinguished between the property and the use, for there was a mesne disposition. And if there had been no more than the gift, and there remaining at Dunton, it would have been a right construction; but then he says, “to go in succession as far as the law will permit.” To say, that they should only go as heir-looms till a tenant for life attain twenty-one, is a forced construction; for what is there then of the nature of inheritance in these heir-looms, if they should stop there? His Lordship decreed that the testator’s books, &c. ought to be considered as heir-looms, and to go along with his real estate as far as by the rules of law or equity they might; and that the plaintiff (the tenant in tail of the estate, but who was not then of age) would be entitled to the property thereof, in case he should attain his age of twenty-one years, and that in the meantime he was entitled to the use and enjoyment thereof. *Trafford v. Trafford*, 3 Atk. 347. So where a testator directed that all his plate, &c. should go as heir-looms, and bequeathed the same to trustees, upon trust, to permit the same to go, together with the mansion house, to such persons as should, from time to time, be entitled to it, for so long time as the rules of law and equity will permit; it was held, that the absolute interest in the plate, &c. vested in the first tenant in tail who came into esse, and that upon his decease under twenty-one, the same should go to his personal representatives. *Carr v. Lord Errol*, 14 Ves. 478. And although his father be tenant for life, yet he will of course be entitled as the representative of his infant son, tenant in tail, dying during his life. *Foley v. Burnell*, 1 Bro. Ch. Ca. 274. *Vaughan v. Burslem*, 3 Bro. Ch. Ca. 101. *Jones v. Lord Sefton*, 4 Ves. 167. *Upton v. Lord Ferrers*, 5 Ves. 806. *Stuart v. Marquess of Bute*, 11 Ves. 657.

From a consideration of the before mentioned cases, the neces-

effect and purpose of transmission, the same shall not vest absolutely in any tenant in tail male of the said mansion house, by purchase, under the devise or limitation of this my will, who shall not attain the age of twenty-one years, or depart this life under that age, leaving issue male of his body living at the time of his decease, or born in due time after: And I direct that they the said [*trustees*], and the survivor of them, and the heirs, executors, and administrators of such survivor, shall, during the space of twenty-one years, to be computed from my decease, receive and take an annual sum of £50 out of the real estates hereinbefore devised and directed to be purchased, and lay out the same in the purchase of books, maps, or prints; and that the same shall be for the benefit of the person for the time being entitled to the possession of my said mansion house at W\_\_\_\_\_, in such manner as is hereinbefore expressed of and concerning the books in my said library at my said mansion house, and kept and preserved in the said library or some adjacent room: And my will is, that if my said mansion house at W\_\_\_\_\_, shall be sold under the trusts hereinbefore expressed and contained of and concerning the same, the said

sity of the declaration in the text will also be apparent; viz. that such personality shall not vest absolutely, for the purposes of transmission, in any child of any tenant for life, until his majority.

[*trustees*], and the survivor of them, and the executors and administrators of such survivor, shall take care that all the said books, maps, and prints shall be preserved for the benefit of the person who for the time being shall be entitled to the actual possession, or to the receipt of the rents, issues, and profits of the hereditaments which shall be purchased with the money arising from the sale of my said estates at W——, and deposited in a proper apartment for that purpose: And I direct a catalogue to be taken of the same; and two copies to be made of the same, both of which shall be signed by the said [*trustees*] and the person for the time being entitled to the said estates; and that one of them shall be kept in my library, and the other by the said trustees or trustee for the time being.

CXV. I give and bequeath unto the said Heir-looms. [*trustees*], their executors, administrators, and assigns, All my jewels; and also all my books, prints, pictures, plate, linen, china, glass, and other articles of furniture which, at the time of my decease, shall be in or about any of my houses hereinbefore devised; To hold the same unto the said [*trustees*], their executors, administrators, and assigns, Upon the trusts following; that is to say; as to my said jewels, Upon trust, to permit the same to be used and enjoyed by my said wife , during her

life: And after her decease, Upon trust, to permit the same to be used and enjoyed, so far as the rules of law and equity will admit, by the person or persons for the time being entitled under this my will, to the possession or to the rents and profits of the said manors, messuages, hereditaments, and premises hereinbefore devised: And as to my said books, prints, pictures, plate, linen, china, glass, and other articles of furniture, Upon trust, to permit the same to go, and be held and enjoyed with the said houses respectively, so far as the rules of law or equity will admit, by the person or persons who for the time being shall be entitled under this my will to the possession of the rents and profits of the same houses respectively: Provided, nevertheless, that the same jewels, books, prints, pictures, plate, linen, china, glass, and other articles of furniture respectively, shall not, as to the effect or purpose of transmission, vest absolutely in any person or persons hereby made tenant or tenants in tail male or in tail, unless such person or persons shall attain the age of twenty-one years: But, nevertheless, such person or persons shall during his, her, or their minority or respective minorities, be entitled to the use and benefit of the said jewels, books, prints, pictures, plate, linen, china, glass, and other articles of furniture respectively: And I direct that as soon as conveniently may be after my

decease, the said [*trustees*], or the survivor of <sup>tory shall</sup> them, or the executors or administrators of <sup>be made.</sup> such survivor, shall cause a distinct schedule or inventory to be made and taken of my said jewels, and also of my said books, prints, pictures, plate, linen, china, glass, and other articles of furniture, in each respective house: And shall cause two copies to be made of each schedule or inventory, and shall keep one of each of the said copies, and shall leave the other copy of the said schedule or inventory of my said jewels, with the person or persons for the time being entitled to the use of the said jewels: And shall from time to time procure such person or persons to sign the copy which shall be left with him, her, or them: And shall leave the other copy of such schedule or inventory of books, prints, pictures, plate, linen, china, ~~glass~~, and other articles of furniture, at the house to which such books, prints, pictures, plate, linen, china, glass, and other articles of furniture shall belong; and shall from time to time procure the person or persons for the time being entitled under this my will to the possession of such house, or to the receipt of the rents and profits thereof, to sign the copy which shall be left in the said house: And I do hereby direct, that the said Trustees to [*trustees*], and the survivor of them, and the <sup>inspect the state of same,</sup> executors, administrators, and assigns of such survivor, shall and may, from time to time, in-

spect and examine into the state of my books, prints, pictures, plate, linen, china, glass, and other articles of furniture; and shall cause such reparations, restorations, or replacings to be made thereof, as they or he shall think necessary; and all such reparations, restorations, or replacings, shall be made at the costs and expense of the person or persons for the time being entitled to hold, use, and enjoy the said books, prints, pictures, plate, linen, china, glass, and other articles of furniture, under the trusts of this my will: And I further direct, that it shall be lawful for the said [*trustees*], and the survivor of them, and the executors, administrators, and assigns of such survivor, from time to time, upon the request in writing of the person or persons for the time being entitled to the use of the said plate under the trusts of this my will, such person or persons having attained his, her, or their age or respective ages of twenty-one years, to exchange the said plate, or any part thereof, for any other article of plate of equal weight and value, the expenses of all which exchanges shall be borne by the person or persons making such request, as aforesaid.

*Plate may be exchanged.*

*Heir-looms.* CXVI. I give and bequeath my plate, jewels, and my books (not hereinbefore otherwise disposed of), unto the said [*trustees*], their executors, administrators, and assigns, In trust,

that they and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall permit such of the said plate, jewels, and books as shall be in my said houses at H. and O., and to be used and enjoyed by the person who, by virtue of or under the limitations contained in the hereinbefore recited indenture and this my will, shall for the time being be entitled to my house at W. To the end and intent that, as far as the rules of law and equity will admit, the same may be as heir-looms, for the benefit of the successive owners of my said houses, in whichever of them they may choose to reside. And for that purpose I positively declare, that the same shall not vest absolutely in the child of any of my children, unless such child shall attain the age of twenty-one years; And I direct two inventories to be made of the same; and that one of them shall be signed by my trustees or trustee for the time being, and the other by the person for the time being entitled to the possession of the said jewels, plate, and books. And I empower my said trustees, on the request in writing of the person who for the time being shall be in possession of the said mansion house at W., to exchange any of the said books for any others of greater value.

CXVII. I devise unto the said trustees,

Presentation  
to advowson  
directed.

their executors, administrators, and assigns, for the term of 99 years, if my son J. D. and my daughters, or either of them, or any husband of either of my said daughters, who shall be in orders, shall so long live, All that the advowson and right of presentation of or to the rectory or church of , in the county of \*, Upon trust, to present my son J. D.

**Advowsons.** \* An advowson is an incorporeal hereditament. It is the right of presentation or collation to a church, and the person possessing this right is the patron of the church. The advowson is not itself the bodily possession of the church and its appendages, but it is a right to give to some other man a title to such bodily possession.

The right of presentation, and the right of nomination, are sometimes confounded; but they are distinct things. Presentation is the offering a clerk to the bishop; nomination is the offering a clerk to the person who has the right of presentation. These rights may exist in different persons at the same time. Plowd. 529. Co. Litt. 17 b. 119 b. 2 Bl. Com. 22.

**Different kinds of advowsons.** Advowsons are either appendant or in gross; that is, are either annexed to the possession of a manor, [or lands, Dyer, 24 b. pl. 153. 1 Roll. 231.] or separated therefrom, and annexed to the person of its owner. They are also presentative, collative, or donative. 2 Bl. Com. 22. Co. Litt. 344 b.

**Qualities of an advowson.** Till the church is vacant, a scisin in law only can be acquired; as if a man seised of an advowson in fee hath issue a daughter, who is married and hath issue, and he dieth seised, the wife, before the church became void, dieth, she had but a seisin in law, and yet the husband shall be tenant by the courtesy, because he could by no industry attain to any other seisin. *Et impotentia excusat legem.* Co. Litt. 29 a. and Hargrave's notes, 4 and 5. An advowson is also subject to dower. (Dyer, Anon. 35 a. pl. 29). An advowson in fee, in gross, is assets in

to the same when and as the same rectory or church shall hereafter become vacant, in case

the hands of the heir, for the payment of the personality debts of the ancestor. There can be no doubt as to an advowson appendant to a manor being assets, because the manor itself being assets, what is appendant must be so likewise. Lord Chancellor King, in *Robinson v. Tonge*, 3 P. Wms. 401, decreed an advowson in gross to be sold to pay debts by specialty. *Westfaling v. Westfaling*, 3 Atk. 459. *Robinson and others v. Tonge*, 2 Str. 879. It is necessary, in order to give seisin to the heir, so as to make him the stock of descent, that he actually present to the advowson (unless such advowson be appendant or appurtenant to a manor, &c. of which he has already obtained an actual seisin). For though a seisin in law in incorporeal hereditaments will, in some cases, entitle the husband to his courtesy; yet it will not be sufficient to turn the descent, but an actual seisin must be acquired. But if a person be disseised of a manor whereto an advowson is appendant, he may, notwithstanding, present to the advowson, before he regain the seisin of the manor. And as seisin of the principal is seisin of the accessory, so the recovery of or remitter to, the principal, is the recovery of or remitter to the accessory also, but not *e converso*; and therefore, if another, during such disseisin, usurp such presentation, yet, on his remitter to the manor, such usurpation is purged, and he shall be remitted to the advowson also. Watk. Desc. 76. By last will and testament, the right of presenting to the next avoidance, or the inheritance of an advowson, may be devised to any person. If such devise be made by the incumbent, the inheritance of the advowson being in him, it is good, though he die incumbent; for the will hath an inception in his life-time. A testator, being seised of the advowson of a donative, the church in his life-time became void, then the testator died, (the church being still void); it was decided, after two arguments in C. B. that the right of donation descended to the heir of the testator, and that his executor had no title, which he would have had if it had been a presentative benefice. There is no case in the books to exclude the heir of a donative from his

he my said son shall take holy orders, and be qualified and willing to be presented to the

turn in this case; a patron of a donative can never be put out of possession by an usurpation. *Repington v. The Governor of Tamworth School*, 2 Wils. 150. A testator, incumbent of the rectory of B. gave, devised, and bequeathed his perpetual advowson, donation, and patronage of the parish church of B. and all glebe lands, profits, and appurtenances to the same belonging, unto G. S. willing and desiring her to sell and dispose of the said perpetual advowson and patronage, with the appurtenances, as soon as she conveniently and lawfully might sell and dispose thereof, to the fellows of Eton College, and their successors, or to the fellows of Trinity College, in Oxford, and their successors, if they would agree to purchase it; and upon the refusal or disagreement of both those societies to purchase the said perpetual advowson, with the appurtenances, the same to be sold to the fellows and society of any one of the colleges of Oxford or Cambridge, who would be the best purchaser; and all the rest of his goods and chattels the testator bequeathed unto the said G. S. Lord Hardwicke, after observing that a resulting trust was not created by the words of the will, which were more properly words of injunction than of trust, said, That as to the presentation, which happened by the death of the testator, the heir at law could not present; for the advowson being devised, it followed the devise, and could not descend; and that as the heir could not take by law, so neither could he in equity, for the devise takes effect instantly; so does the avoidance; and it is a devise of the beneficial interest, accompanied with an injunction to sell to particular societies, and no other trust; if so, every thing else that is beneficial takes effect immediately in the devisee. *Hill v. Bishop of London*, 1 Atk. 618. In the case of *Hawkins v. Chappel*, 1 Atk. 622, Lord Hardwicke laid it down, that if a man seised of an advowson be likewise incumbent of the living, and devises the advowson, upon his death the devisee will be entitled to nominate. And also, that, in the case referred to, the legal and equitable estate being devised away by the will, and the ownership in equity vested in the *cestui que trust* of the surplus, the nomina-

same. And in case he shall not be qualified in due time, or shall be unwilling to be presented thereto, Upon trust to present to the same, the husband of either of my said daughters who may go into holy orders, and be in due time qualified and willing to be presented to the same, giving the preference to the husband of my eldest daughter, if both my daughters shall happen to have husbands qualified and willing to be presented to such livings; and subject to the trusts aforesaid, Upon trust, to present to the same respectively such person or persons as the person for the time being entitled to the advowson of the living in remainder, immediately expectant on the determination of the said term of 99 years, by virtue of this my will, shall for that purpose nominate or appoint.

**CXVIII. I give and devise unto the said** Devise of  
advowson.

to the avoidance followed such equitable ownership of the  
advowson.

A person may be tenant in fee simple of an advowson. It may also be entailed; for "tenements" is the only word which the stat. West. 2. (13 Edw. 1, c. 1.) that created estates tail, useth; and it includes not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to, or exercisable within the same, though they lie not in tenure; therefore all these, without question, may be entailed. Co. Litt. 20 a. An estate-tail in an advowson cannot be discontinued, for nothing passes by the grant, except what the owner may lawfully give. 3 Rep. 85 b. Co. Lit. 322 b.

[*trustees*], their heirs and assigns, all my advowson, donation, and right of patronage, of, in, and to the rectory and parish church of , in the county of , Upon trust, that they the said [*trustees*], or the survivor of them, his heirs or assigns, shall and do present to the same my son , when the same shall become vacant by the death or resignation of the present incumbent thereof, if my said son shall then be qualified and willing to be presented to the same. And in case he shall not be qualified in due time, then upon trust, to present thereto some fit person, under confidence to resign the same upon request; to the intent that my said son, when capable, may be presented to the same. And I desire that the said [*trustees*], or the survivor of them, his heirs or assigns, shall then require such resignation, and present my said son to the same, and convey and assure the said advowson, donation, and right of patronage, unto and to the use of , his heirs and assigns for ever.

Bequest of  
farming  
stock to per-  
sons first  
entitled to  
the premi-  
ses,

CXIX. I give all the farming stock, and all provisions whatsoever, which shall be in or about my house, which at the time of my decease shall be occupied by me, or any of my sons, or by any bailiff, servant, or other person for my use, To the person who, at the time of my decease, shall first become entitled, under

the limitations of this my will, to the house, in or about which the same shall be. And I give and of arrear to my son the arrear of rent which, at the time of my decease, shall be due on my estate at , included in the settlement executed on his marriage. And I give to each of the persons who, at the time of my decease, shall first become entitled to the estates hereinbefore respectively devised, the arrear of rent which, at the time of my decease, shall be due from the estate to which he shall so first become entitled.

**CXX.** Whereas I have purchased the land-  
tax of the estates hereinbefore devised; now I declare my will to be, that the same henceforth shall be merged in and consolidated with the estates out of which the same is issuing, and I devise the same accordingly.

**CXXI.** And I declare that the devises and bequests, hereby made by me to, or in favor of my said wife and children, are on condition, that if they are respectively required so to do by my executors, they shall execute proper deeds for releasing my said estates and effects from their claims and demands by virtue of my marriage settlement, or otherwise howsoever\*.

\* It has been a subject for learned discussion, whether the Election doctrine of election be exclusively equitable, or whether it be a

Testator re-  
quires chil-  
dren to ac-

## CXXII. And I do hereby particularly en- join the said                  and                  , and my said

rule of law, as well as of equity. See Mr. Swanston's note, 1  
vol. of his Reports, 425.

To what  
case the  
doctrine of  
election is  
applied.

The foundation of the doctrine of election is, that no person shall claim under, and in opposition to the same instrument. A person shall not claim an interest under an instrument, without giving full effect to that instrument, as far as he can. If, therefore, a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, such person shall not be permitted to defeat the disposition where it is in his power, and yet to take under the will. The reason is, the implied condition that he shall not take both; and the consequence follows, that there must be an election; for, though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property, unless in the manner intended by the testator. *Thellusson v. Woodford*, 13 Ves. 220.

If the instrument be such as to indicate the intention, the only question is, Did the testator intend the property to go in such a manner? not whether he had power to do so, and would have done it, had he known he could not without a condition imposed upon another person. In every case of election, there must be an intention to dispose of property over which the testator has no power of disposition; that is the circumstance which creates election. In all cases of election the court is anxious, while it enforces the rule of equity, that the party shall not avail himself of both his claims, still to secure to him the option of either; not to hold him concluded by equivocal acts performed, perhaps in ignorance of the value of the funds; a principle strongly illustrated by the decision in *Wake v. Wake*, 3 Bro. Ch. Ca. 255. The rule of court is not forfeiture, but election *utrum horum*. What acts will amount to election, what length of time may be allowed, is matter of more doubt. It is the disposition of the

daughters, and each and every of them, to acquiesce in the disposition made, or intended to be by his will,

court to hold, that if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation, and place the other party in the same situation as if those benefits had not been accepted, they may renounce them, and elect for themselves. *Dillon v. Parker*, 1 Swanst. 359. With regard to this point, the learned reporter of the last-mentioned case refers to that of *Tomkins v. Ladbroke*, 2 Ves. 593; in which Lord Hardwicke said, that where a free-man, by will, disposes of his whole personal estate between his wife and children, and after his death the wife has submitted to the will (not by declaration in writing, but without disturbing it), and the wife dies, and her representatives bring a bill for an account, insisting that the wife was entitled to her share by the custom, and that her husband's will was void; the court would deny relief to the representatives of the wife, because her enjoyment under the will was an evidence of her assent; and upon that principle only, not to disturb things long acquiesced in by families, upon the foot of rights which those in whose place they stand never called in question. See also *Burke v. Broadhurst*, 1 Ves. Junr. 171. S. C. 3 Bro. Ch. Ca. 88. *Freke v. Lord Barrington*, 3 Bro. Ch. Ca. 274.

The heir to whom an estate is devised in fee may be put to an election, although, by the rule of law, a devise in fee to the heir is inoperative; for, if the will is in other respects so framed as to raise a case of election, then not only is the estate given to the heir, under an implied condition that he shall confirm the whole of the will; but, in contemplation of equity, the testator means, in case the condition shall not be complied with, to give the disappointed devisees, out of the estate over which he had no power, a benefit correspondent to that of which they are deprived by such non-compliance; so that the devise is read as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him as shall be equal in value to the estates intended for

and to execute such deeds as be made, by this my will and the hereinbefore recited indenture of settlement, And to make,

them. *Per Sir Wm. Grant, Welby v. Welby*, 2 Ves. and Bea. 190.

As to election by the widow.

A testator gave to his wife and "his two children all his estates whatsoever, to be equally divided amongst them, whether real or personal, making no distinction in favour of the male, as it was his intent that his daughter should have an equal share with his son of all his property, after paying certain legacies." The property was specified as consisting of freehold ground-rents, money on mortgage, American bank stock, an estate in America, &c. It was declared by the will, that it was the testator's further intention that, in case of the death of his wife, the portion or part bequeathed to her should descend to his two children equally; and in the event of both their deaths before her, that she should enjoy, during her life, the portion or parts left or bequeathed by him in that instrument unto them; and in the event of the death of his said wife and two children, (that is to say), supposing his two children, then infants, should die without issue, it was his further will that his mother and sister should inherit, after them, the whole of the said property during their lives; and at their death, that it should go in regular descent to the children of the testator's sisters. The Master of the Rolls said, that as to the widow's right to dower, whether she took under the will an absolute interest, or for life only, it was a case of election, the claim of dower being directly inconsistent with the disposition of the will. The testator directing all his real and personal estate to be equally divided, &c.; the same equality is intended to take place in the division of the real as of the personal estate, which cannot be, if the widow first takes out of it her dower, and then a third of the remaining two-thirds. Farther, by describing his English estates, he excludes the ambiguity which Lord Thurlow, in *Foster v. Cooke*, imputed to the words "my estate," as not necessarily extending to the wife's dower. Here the testator says, the property thus bequeathed by him consists of these particulars. It was, therefore, the property itself thus described, which was the subject of the devise, and not what might, in contemplation of

do, and execute all such deeds, conveyances, trustees  
and assurances as the said [trustees], or the <sup>shall re-</sup>  
<sup>quire;</sup>

law, be the testator's interest in that property. The court held, that this was, therefore, a case of election; but that, before the widow could be compelled to elect, she was entitled to know what she had a right to under the will. *Chalmers v. Storil*, 2 Ves. & Bea. 222. And see note, p. 164.

A testator, having two daughters, devised lands, of which he Other cases was possessed in fee-simple, to B.; and other lands, of which he of election. was only tenant in tail, to C. It was held, that the daughter who claimed a share of the entailed lands must relinquish her claim to the fee-simple lands devised to her; for, the testator having disposed of his whole estate amongst his children, what he gave them was upon an implied condition, that they should release to each other. *Noys v. Mordaunt*, 2 Vern. 581. In the case of *Streatfield v. Streatfield*, Forrest. 176, a person agreed by articles, previous to marriage, to settle lands to the use of himself and his wife for their lives, with remainder to the use of the heirs of their bodies; he afterwards made a settlement, which was not pursuant to the articles, and on the marriage of the son settled other lands on him, and levied a fine of the lands comprised in the articles, to the use of himself in fee; by his will he devised part of those lands to his daughter, and the rest of his estates to his grandson. It was held by Lord Talbot, that the grandson, being entitled to the lands comprised in the articles, should be put to his election, whether he would take under the will, or under the articles. In *Herle v. Greenbank*, 3 Atk. 695, a feme covert and an infant, who had by her father's will a power to dispose of real and personal estate, being about seventeen, disposed of the personal estate of her father to her daughter, and her real estate to two collateral relations, and died under age. Lord Hardwicke was of opinion, that as to the personal, it was a good will, because of her power, which took off the disability from being married, leaving her in the same condition as a feme sole, in which case, being about seventeen, she might make a will of personal estate; but that as to the real, her will was void, because of her infancy, as it would if she had been a feme

survivor of them, or the executors or administrators of such survivor, shall think necessary

sole. It was held, that as there was no instrument executed sufficient to pass land, there was no ground for the court to imply a condition to abide by a will of land when there was none; and that it would be dangerous to break in on the statute of frauds to make an estate pass by an instrument not sufficient to pass real estate, not by the words of the testator, but by a condition implied by construction of the court; therefore it could not be, nor was it warranted by any precedent, for it was only guessing at the intent of the testator.

A testator devised real estate to his younger son, and all his personal estate among his children, and a contingent legacy to a grand-daughter (who became testator's heir at law, and therefore entitled to whatever he left to descend, or ought to descend, from the invalidity of the disposition). The testator added a clause to his will, declaring that "if any child or children of mine, or any in their right, or any who may receive benefit by my will, shall any way litigate, dispute, or controvert the whole or any part thereof, or the codicils thereto belonging, or not give such discharges as my will requires, or not comply with the whole, and all and every condition and conditions therein contained, both as to real and personal estate, such child or children, so far as it relates to them severally, shall forfeit all claim and pretence whatever under my will, and shall have no more than the orphanage part of the personal estate I die possessed of; revoking what I gave to them, I give it to my residuary legatees." The testator underwrote an attestation to this instrument in the common form, but it was not subscribed by him, nor did any witness subscribe it at all. There was a codicil without date, but signed by him, therein taking notice of and reciting, that in further consideration of his last will, he made a codicil thereto. It was held, that an express condition being annexed to the personal legacies, the grand-daughter could not take both the real and personal estate.  
*Boughton v. Boughton*, 2 Ves. 12.

**Election** If there is no devise of real estate, but a personal legacy is given, raised by a **on express condition that the legatee should not enjoy it, unless**

or expedient to give effect to the same, or any previous to  
of them. And I require, that before any of deriving any  
my said children shall be entitled to, or permit-

within a certain time he conveys a real estate, whether com- condition  
ing from the testator or not, he shall not enjoy it but on those annexed,  
terms. The lands not passing by force of the will, but from  
the operation of the clause, the legatee has it in his power  
whether he will part with the land or not; if not, he forfeits  
the condition; for any lawful condition may be annexed. If  
in the same instrument there be a devise both of real and  
personal estate, and the will executed is only sufficient to  
pass the personal, not the real; but a condition annexed, that the  
personal legatee should permit the same persons to whom the  
land is given, to hold to them and their heirs; the condition an-  
nexed would take place, though the devise was void as to the  
lands, according to the statute of frauds; for the legatee cannot  
take it in contradiction to the testator's words. See *Boughton v.*  
*Boughton, supra.* And see *Simpson v. Vickers, 14 Ves. 341.*

Where a will is unattested to pass lands, it cannot be read  
so as to raise a question of election, unless it contains an express  
condition attached to the legacy, to give up the real estate, at-  
tempted to be disposed of by the unexecuted will. *Sheddon v.*  
*Goodrich, 8 Ves. 496.*

The doctrine of election is utterly inapplicable to creditors tak- not appli-  
ing benefit under a devise for payment of debts, and inforging cable to  
their claim upon the devised estates. *Kidney v. Coussmaker,*  
12 Ves. 136.

The party in whom the right of election vests, is entitled to No person  
file a bill, to have the debts and legacies paid, and the property need elect  
cleared, in order to ascertain the value of the funds. *Chalmers knowledge*  
*v. Storil, supra.* *Wake v. Wake, supra.* *Whistler v. Webster,* of the funds.  
2 Ves. jun. 371.

The point, whether the effect of election, to take in opposition  
to a will, produces absolute forfeiture of the benefits proposed,  
or only imposes an obligation to compensate the claimants whom  
the election disappoints, is examined by Mr. Swanston, in a note  
to the case of *Cretton v. Haward, 1 Swanst. 433.*

ted to take any benefit under this my will, they shall respectively execute such acts, deeds, conveyances, and assurances, as the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, shall require for the purposes aforesaid, or any of them, or for releasing and discharging the estates comprised in the hereinbefore recited indentures, and all my real and personal estates whatsoever, for all their rights, titles, interests, claims, or demands, of or in the same, except under the said indentures and this my will.

*and that in case of refusal,* And that if my said children, or any of them, shall insist upon any such right, title, interest, claim, or demand, or if the said children, or any of them, shall be requested by the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, to make, do, and execute, or to join or concur in making, doing, or executing, any act, deed, conveyance, or assurance whatsoever, for confirming and giving effect to this my will, or any of the limitations or trusts hereinbefore contained, or to any of the said deeds, or other assurances recited in this my will, or any of the uses or trusts therein respectively contained: and shall, for the space of [ ] calendar months, neglect or refuse to make, do, or execute any such act, deed, conveyance, or assurance, as aforesaid; then, and

*for (three) months,* all the devises made in favour of such child in that case, and from that time, all and singular the devises and bequests hereinbefore con-

tained, and hereby made, or which shall be con- so refusing  
tained in or made by any codicil, executed by <sup>shall cease,</sup>  
me, to or in favor of him or them so neglecting  
or refusing, and to or in favor of his and their  
issue, shall absolutely cease and determine;  
and the estate and effects comprised in the and go as in  
said devises or bequests shall go in the same <sup>case of death</sup> without is-  
manner as the same respectively would have <sup>sue in the</sup> life-time of  
gone, if the person or persons so respectively testator.  
refusing or neglecting had died without issue  
in the life-time of me the testator.

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### RESIDUE.

CXXIII. And as to all the rest and residue \* Devise and  
of my real and personal estates whatsoever and residue.

\* It has been long settled that a residuary bequest of personal As to the  
estate, (for it is otherwise as to real), carries not only every thing residue.  
not disposed of, but every thing that in the event turns out not  
to be disposed of: not in consequence of any direct or expressed  
intention; for it may be argued in all cases, that particular lega-  
cies are separated from the residue; and that the testator does  
not mean that the residuary legatee should take what is given  
from him: no, for he does not contemplate the case; the resi-  
duary legatee is to take only what is left, but that does not pre-  
vent the right of the residuary legatee. A presumption arises  
for the residuary legatee, against every one except the particular  
legatee. The testator is supposed to give it away from the resi-  
duary legatee, only for the sake of the particular legatee. *Cam-  
bridge v. Rous*, 8 Ves. 12.

But if a testator circumscribe and confine the residue, then the

wheresoever, (except such part thereof as may be vested in me; In trust, or by way of mort-

residuary legatee, instead of becoming a general legatee, becomes a specific legatee. *Attorney-General v. Johnstone*, Ambl. 577.

In case of lapse of real estate, the heir at law takes: but in the case of personal property, the residuary legatee is preferred, either to the next of kin or the executor.

A residuary devisee does not take a lapsed devise, but a residuary legatee takes every thing that lapses. *Dawson v. Clarke*, 15 Ves. 415.

As to residue undisposed of. A different rule prevails between general legacies and the residuum of the personal estate; for when part of the residue is in any event undisposed of, it does not again assume the nature of residue, and go to augment the shares of other residuary legatees. Where, therefore, part of the residue was given to a legatee, and subsequently cancelled, it was held that having once formed part of the residue, it was undisposed of and belonged to the next of kin. *Skrymsher v. Northcote*, 1 Wils. 248. Where a testator directed real estate to be sold, and the money to be applied to a particular purpose, and made a subsequent bequest of the rest and residue of his personal estate; it was held, that there was a resulting trust for the heir at law, and that the surplus, after the particular purpose was answered, did not form part of the personal estate, so as to pass by the residuary bequest. But if the will furnish sufficient indication of the intention of the testator to make an absolute conversion of his real into personal estate, of course such intention will prevail. *Maughan v. Mason*, 1 Ves. & Bea. 410.

As to rights of executors to the residue. Whether any part of the personal estate of a testator may be said to be undisposed of by his will, is merely a consideration of equity; for at common law, making a will and appointing an executor is held to be a disposition of the whole personal estate. Therefore, as the appointment of an executor vests all the personal estate of the testator in him, if any surplus remain undisposed of, it will by law belong to the executor. But where a necessary implication or violent presumption appears, that the testator, by naming an executor, meant to give the office only, and

gage), I give, devise, and bequeath the same unto and to the use of the said [trustees], their to trustees,

not the benefit arising therefrom, the executor will, by the court, be considered as a trustee merely: and there will be a resulting trust for the next of kin, upon an equity founded on the statutes of distribution. *Southcot v. Watson*, 3 Atk. 226. The general rule is, that if there be any declaration that executors are but trustees, or if they have particular legacies, the residue shall in such cases be considered as undisposed of. *Graydon v. Hicks*, 2 Atk. 16. But it is always open to the next of kin to shew intention from the particular wording of the will adverse to the effect of the legal appointment of executor. The circumstances from which it may be endeavoured to deduce that intention, may be infinitely varied; and it is impossible to lay down any rules to prevent the frequent recurrence of this question. Some judges have been disposed to give way to a very slight indication of intention against the executors, and almost to put them upon proof of an intention in their favour. The doctrine however, is, that the executor shall take beneficially, unless there is a *strong and violent presumption* that he shall not so take; for though Lord Thurlow, in *Bowker v. Hunter*, 1 Bro. C. C. 328, is made to say, it must be an *irresistible inference*; that is not the rule, but it must be, as it is stated in many cases, a *strong and violent presumption*. *Clennel v. Lewthwaite*, 2 Ves. junr. 465. *Pratt v. Sladden*, 14 Ves. 193. *Munyard v. New*, 3 Swanst. 119. Where, upon the face of a will, it appears that the executor was intended to take the office only, or where the testator has raised a trust, which fails of being carried into effect, or where he has clearly intended to create a particular trust, but which he has failed in doing, the next of kin will take as against the executor. On the other hand, it is equally clear, that, if there be a mere legacy given to the executor, where the presumption of law is to be acted upon, that the testator could not mean to give all and part, (a presumption which, whether reasonable or not, the court is bound to act upon, as the doctrine has been so long laid down), the executor may rebut the presumption by parol evidence, as to declarations made before the testator executed his will, or at the

heirs, executors, administrators, and assigns, according to the nature and quality thereof,

time of making his will, or after he had made his will. In giving effect to these declarations, regard must be had to the circumstances in which they were made. *Lynn v. Beaver*, 1 Turn. 63. *Clelland v. Lewthwaite, supra.*

The ground upon which an executor with a legacy, or executors having equal legacies, are trustees of the residue, is, that having a part given, they cannot be intended to take the whole. That is the settled law; and it would be vain and improper now to question the propriety of such a determination. But the principle upon which this doctrine has been introduced, that an executor, having a legacy, is a trustee, has given so little satisfaction, that case upon case has occurred, paring down the application of that doctrine, until it is not easy to say upon what foundation it stands. *King v. Denison*, 1 Ves. & Bea. 277.

The rule from *Lawson v. Lawson*, 7 Bro. Parl. Ca. 511, is a safe guide, viz. that for a legacy to take away the right of the executor, it is not sufficient simply to say, there is a legacy; but it must be so qualified, that the giving it is inconsistent with the supposition that the executor is to take the whole. *Hornsby v. Finch*, 2 Ves. junr. 30. Though the rule has been also put in a different way, viz. that, if a legacy is given generally to an executor, he shall be excluded from the residue, *without strong proof that he was intended to take*. *Nourse v. Finch*, 1 Ves. junr. 357. The proper conclusion seems to be, that where the legacy is *consistent* with the intent that the executor shall take the whole, a Court of Equity will not disturb his legal right. *Farrington v. Knightly*, 1 P. Wms. 550, n.

A legacy to an executor for his pains and labour, is a declaration that he is to take the office as an office of burthen, and is not to have the benefit of the estate. *Langham v. Sanford*, 17 Ves. 435. *Griffiths v. Hamilton*, 12 Ves. 308.

There never has been a case in which the executors have been permitted to take the residue for their own use and benefit, when equal legacies have been given to them, and given to them as executors. Their having equal legacies marks them

spectively; Upon trust, that they the said [trustees], or the survivor of them, or the heirs,

as being intended to discharge laborious duties, and not to take for their own use and benefit what may be left as residue. *Omanney v. Butcher*, 1 Turn. 269. *Nisbett v. Murray*, 5 Ves. 158. *Gibbs v. Rumsey*, 2 Ves. & Bea. 294. But all the authorities agree, that, where the legacies to them are unequal, they are not trustees; but the effect is a preference *pro tanto* to one. Particularly, when the legacies are not given to them in the character of executors, and have no relation to that character, but are given to them before they are named as executors. *Griffiths v. Hamilton*, 12 Ves. 298. So, distinct specific legacies of unequal value, to several executors, will not exclude them. *Blinkhorn v. Feast*, 2 Ves. 26; though (on the before-mentioned principle) a specific legacy to a sole executor has been held to exclude him from the residue. *Southcot v. Watson*, 3 Atk. 226. Where the wife is executrix, if she have a legacy, she also will be excluded from taking the residue. *Martin v. Rebow*, 1 Bro. Ch. Ca. 154.

If it appear that a testator contemplated, at the time of making his will, a further disposition of the residue, the executors will be excluded, although the clause containing the disposition of the residue be imperfect or unfinished. But, to exclude executors from their legal right, it must appear, with respect to imperfect clauses, that the blank or incomplete part of the clause was left for the purpose of introducing a residuary clause to give the residue away from them. A mere blank space between the signature and the writing can afford no inference that the testator intended to exclude the right of the executor by a disposal of the residue. *White v. Williams*, 3 Ves. & Bea. 72. Where the sentence was begun, and abruptly broken off in this manner "I leave to C.," without saying any more, the residue was distributed amongst the next of kin. *Nevil v. Parker*, cited 2 Ves. 92. A testator, having in the first part of his will named two persons executors, who might be in two lights, either as trustees barely, and for the management and administration of his personal estate, or to take the beneficial interest; and he afterwards wrote an imperfect clause, bequeathing the residue, without nam-

executors, administrators, or assigns of such survivor, do and shall, with all convenient speed after my decease, call in and convert into money all my said personal estate (except such part thereof as shall consist of leasehold lands and tenements, or so much thereof as shall not consist of money). And also do and shall at such time or times, and when and as they the said trustees or trustee for the time being of this my will shall think proper, absolutely sell and dispose of all my said real estate, and so much of my said personal estate as shall consist of leasehold lands and tenements, either in one lot or in several lots, by public auction or private contract, to any person or persons, willing to purchase the same, and for such price or prices as to the said trustees or trustee for the time being shall seem reasonable; and for promoting and facilitating such sale or sales, do and shall enter into, make, and execute all such contracts, conveyances, surrenders, or assurances, acts, and deeds, as the said trustees or trustee for the time being shall think proper.

And I do hereby declare, that the said trustees or trustee for the time being shall, with and out of the said monies, [pay, satisfy, and discharge all my just debts, funeral andtestamen-

to collect in  
the personal  
estate;

and to sell  
the real es-  
tate and  
leaseholds

by public  
auction or  
private con-  
tract:

and enter  
into con-  
tracts, and  
make con-  
veyances.

trustees to  
pay debts,

ing a legatee: it was considered that the executors were excluded by such inchoate gift. *The Bishop of Cloyne v. Young*, 2 Ves. 91. *Lord North v. Purdon*, Ib. 494.

tary expenses, &c. *See Index "Debts."*]

And shall lay out and invest the residue of the and invest  
said monies which shall remain, after answering residue  
the purposes aforesaid, in their or his names or  
name, in the parliamentary stocks or public in the funds,  
funds of Great Britain, or at interest on go-  
vernment or real securities in England or Wales.

And shall, from time to time, alter, vary, and To change  
transpose the said trust monies, so to be laid securities,  
out and invested as aforesaid, for, into, or upon  
other stocks, funds, and securities of the like  
nature, at their or his discretion. And I do and to stand  
hereby declare, that the said trustees or trustees  
of trust for the time being shall stand and be pos- monies;  
sessed of and interested in the said trust mo-  
nies, and the stocks, funds, and securities on  
which they shall be invested, and the interest,  
dividends, and annual produce thereof; Upon  
and for the trusts, intents and purposes here-  
inafter expressed of and concerning the same;  
that is to say; Upon trust, that they the said Upon trust,  
trustees or trustee for the time being do and &c.  
shall, &c.

CXXIV. And I do hereby declare, that if Survivorship  
any of my child or children, being a young- and accrue.  
er son, shall depart this life, or become an eld-  
est or only son, so for the time being seised  
or entitled as aforesaid; or being a daughter,  
shall depart this life, before the share here-  
by intended for him, her, or them respectively

shall so become vested as aforesaid; then, and in every such case, as well the share hereby originally provided for every such younger son so dying, or becoming an eldest or only son, seised or entitled as aforesaid; and for every such daughter so dying, as the share or shares which by virtue of this present clause shall have survived or accrued to him, her, or them respectively; or so much thereof as shall not have been previously applied to his or her preferment or advancement in the world, by virtue or in pursuance of the power or authority hereinafter for that purpose contained, shall, from time to time go, accrue, and belong to the survivors and survivor, or others and other of the said children; and so far as circumstances will admit, shall vest in and be paid to him, her, or them, (if more than one), in equal shares, at such time or times, and in such manner as is hereinafter declared and expressed touching or concerning his, her, or their original portion or portions.

**Survivorship and accruer.** CXXV. And I do hereby direct, that if there shall be more than one child for whom portions are intended to be hereby provided, and any of them, being a son or sons, shall depart this life, or become an eldest or only son, so for the time being entitled as aforesaid, or being a daughter or daughters, shall depart this life without having obtained a vested interest or

vested interests, in the share or shares hereby intended for him, her, or them respectively; then, and in such case, and so often as the same shall happen, as well the share or shares hereby originally intended for the son or sons so dying, or becoming an eldest or only son, entitled as aforesaid, and for the daughter or daughters so dying, as the share or shares which, by virtue of this present clause, shall have survived or accrued to him, her or them, respectively, or so much thereof respectively as shall not have been previously applied for his, her, or their preferment or advancement in the world, by virtue or in pursuance of the power or authority hereinafter for that purpose contained, shall, from time to time, go, accrue, and belong to the survivors and survivor, and others and other of such children, (not being an eldest or only son so for the time being entitled as aforesaid), and so far as circumstances will admit, shall vest in and be paid to him, her, or them, (if more than one), in equal shares, at such time or times, and in such manner as is hereinafter declared and expressed touching or concerning his, her, or their original share or shares, of and in the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof.

CXXVI. Provided always, and I do hereby Survivorship declare, that if any one or more of my said <sup>and accrue.</sup>

children, being a son or sons, shall die under the age of twenty-one years; or being a daughter or daughters, shall die under that age without having been married with the consent of her or their guardian or guardians for the time being; then, as well the original share or shares of the child or children so dying, as the share or shares which, by virtue of this present proviso shall have survived or accrued to him, her, or them, of and in the hereinbefore mentioned trust estate, monies, and premises, or of so much thereof as shall not previously have been applied for his, her, or their maintenance, advancement, or preferment, by virtue of this my will, shall, from time to time, go, accrue, and belong to the survivors and survivor, and others and other of my said children, if more than one, in equal shares, as tenants in common.

*Survivorship and accruer.* CXXVII. Provided always nevertheless, and it is my will and mind, that if any such child or children, being a son or sons, shall die without issue, before he or they shall attain his or their age or ages of twenty-one years respectively; and being a daughter or daughters, shall die before she or they shall attain her or their age or ages of twenty-one years respectively, and without having been married; then, as well the original share or shares of him, her, or them so dying as aforesaid, (or so much thereof respectively as shall not have been disposed of

and applied for his, her, or their preferment or advancement in the world), as also the share or shares accruing to him, her, or them under this present proviso, shall go and be paid; and I give and bequeath the same to the survivors or survivor, or others or other of the same issue; and if more than one, in equal shares, to be vested in such survivors or survivor, or others or other of them, in like manner as his, her, or their original share or shares.

CXXVIII. Provided always, and I do here-  
 by declare my will and mind to be, that it shall <sup>against as</sup> be lawful for my said daughters respective-  
 ly, to charge, sell, assign, or otherwise dispose  
 of, by way of anticipation, the interest, divi-  
 dends, and annual produce, so to them respec-  
 tively payable as aforesaid: And that notwith-  
 standing such charge, sale, assignment, or  
 other disposition, it may and shall be lawful to  
 and for my said trustees or trustee for the time  
 being, and they, he, and she, are ~~and is~~ hereby  
 required, to pay the said interest, dividends,  
 and annual produce, into the proper hands of  
 my said daughters respectively, for their re-  
 spective, separate, and peculiar use and bene-  
 fit, upon their own respective receipts.

CXXIX. I give, devise, and bequeath all my Devise of  
 leasehold messuages, lands, tenements, and he-  
 leaseholds.

reditaments, whatsoever and wheresoever,  
 which are customarily renewable from time to  
 time upon payment of fines, unto the said  
 and , their heirs, executors, administrators,  
 and assigns, according to the nature and  
 quality thereof respectively, for the respective  
 estates or interests which I shall have therein  
 Trustees di- at the time of my decease, Upon trust, that the  
 rected said and , and the survivor of  
 them, and the heirs, executors, administrators,  
 and assigns of such survivor, do and shall, out  
 of the rents and profits of the said leasehold  
 premises, pay and perform the rents and cove-  
 nants of the said leasehold premises which shall  
 be subsisting at the time of my decease, and to  
 be reserved and contained in the renewed leases  
 of the same premises, and which from time to  
 time ought to be paid, observed, and perform-  
 ed on the part of the lessees: And upon this  
 further trust, that the said and ,  
 and the survivor of them, and the heirs, exec-  
 utors, administrators, and assigns of such sur-  
 vivor, do and shall, from time to time, use his  
 and their utmost endeavours to renew the  
 subsisting leases of the said leasehold premises,  
 upon reasonable terms, so that the said pre-  
 mises may, during the continuance of the trusts  
 tinuance of of this my will, so far as the circumstances of  
 the trusts of the case will admit, be respectively held, at  
 least for three lives, or for a long term of years  
 determinable on three lives, or for twenty-one

years absolute: And in order thereto, do and And out of shall, out of the rents and profits of the said rents, insure leasehold premises, effect and keep on foot in- *cestuis que surances on the lives of the respective cestuis que vie,* *que vie* named in such of the subsisting leases for the time being of the said leasehold premises as shall be held for lives, or years determinable on lives; or on the lives of such of the *cestuis que vie* as shall be insurable at reasonable premiums; and I direct that the money to be insured on each life shall amount to such sum as in the opinion of the said trustees or trustee for the time being, of the said leasehold premises, shall be sufficient to enable them or him, whenever any such life shall drop or fall, to effect a renewal of the subsisting lease, in as further provision for which such life shall have been named a *cestui renewal,* *que vie*; And do and shall apply the money to be from time to time obtained or received on the insurance of each such life, as aforesaid, in effecting a renewal of the subsisting lease, in which such life shall have been named a *cestui que vie*; And do and shall pay the surplus of and to pay such money (if any) to the person who, under <sup>surplus of insurance</sup> the trusts hereinafter declared, shall for the <sup>money to persons be-</sup> time being be in the possession of the said <sup>\*</sup><sub>beneficially interested;</sub> leasehold premises, or beneficially entitled to the rents and profits thereof: And do and shall and by out of the rents and profits of the said lease- <sup>rents, or mortgage,</sup> hold premises, or by mortgage thereof, or of <sup>effect renewals,</sup> any part thereof, raise money sufficient to ef-

fect the renewal of any of the subsisting leases of the said premises for the time being, when and so often as a renewal shall be advisable or necessary; and as from the not insuring, or from the insufficiency of the money arising from any such insurance, as aforesaid, or from any other cause, there shall be no other funds, or insufficient funds for the purpose: And do and shall apply the money to be so raised, in or towards effecting such renewal or renewals accordingly; and for the purpose of effecting the renewal hereinbefore directed to be made, the said trustees or trustee for the time being of the said leasehold premises do and shall, from time to time, surrender the subsisting leases, and accept new leases, and do and shall execute all such and to stand other acts and deeds as shall be necessary: And possessed of I do hereby declare that, subject to the trusts hereinbefore declared, the said trustees or trustee for the time being of the said leasehold premises, shall stand and be seised and possessed of the same during the continuance of the leases for which the same shall be respectively held, either at the time of my decease, or by virtue of the trusts for renewal hereinbefore contained, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoies, and declarations, as regard being had to the difference in the nature and quality of the respective estates, will best or nearest correspond with the uses, trusts, intents,

Upon trusts, &c.

purposes, powers, provisoes, and declarations nearest cor-  
responding  
hereinbefore expressed and declared of and with the  
concerning the manors, messuages, heredita-  
uses, &c.  
ments, and premises hereinbefore devised: Pro-  
vided always, nevertheless, that for the effect against  
or purpose of transmission (*see note*, p. 137), the transmission  
said leasehold premises shall not vest absolute-  
till tenant in  
ly in any person or persons hereby made tenant  
in tail, at-  
or tenants in tail male, or in tail, unless such ty-one.  
in tail, at-  
person or persons shall live to attain the age of  
twenty-one years.

CXXX. Provided always, and I do hereby Power to  
further declare, that it shall be lawful for every  
person, who by virtue of this my will shall be  
tenant for life in possession of the manors,  
messuages, hereditaments, and premises here-  
inbefore devised, or entitled to the rents and  
profits thereof, and who shall have attained  
his or her age of twenty-one years, and for the  
said [trustees], and the survivor of them, and  
the executors or administrators, of such sur-  
vivor, from time to time, and at all times dur-  
ing the minority or respective minorities of any  
such tenant for life, or of any person or per-  
sons, who, by virtue of this my will, shall be en-  
titled to the possession or to the rents and pro-  
fits of the said manors, messuages, heredita-  
ments, and premises, as tenant in tail male, or  
in tail, by any deed or deeds, either referring  
or not referring to this present power, to be

sealed and delivered by him, her or them, respectively, in the presence of, and attested by two or more witnesses, to appoint, by way of demise or lease \*, all or any part of the said

Powers to  
lease.

\* Leases made by tenant for life will determine by his death. Powers are therefore inserted in wills to enable the tenant for life to grant leases, which will be valid against those persons who take in remainder. First, the constitution of these powers ought to be interpreted according to the intent of the parties. Secondly, the powers must be strictly pursued. *Winter v. Loveday*, 5 Mod. 380. The donee of the power has a right to enjoy the full exercise of it. They, over whose estate it is given, have a right to say it shall not be exceeded. The conditions shall not be evaded; but the power shall be strictly pursued in form and substance; and all acts done under a special authority, which are not agreeable thereto, nor warranted thereby, must be void. *Taylor v. Horde*, 1 Burr. 121. Courts of justice have always looked with a jealous eye to see that the conditions in favour of the next taker be pursued, not literally only, but substantially.

As to the  
reservation  
of rent and  
conditions  
to be insert-  
ed in lease  
under pow-  
ers.

The rent reserved by leases granted under powers, must be payable annually during the whole term. The remainder-man must not be put under difficulties in avowing; therefore, leases reserving "the best rent," or the "ancient rent," where lands had been usually demised, are void under a power. It is not sufficient that the amount of the ancient rent be reserved; it must be reserved with all the beneficial circumstances usually attendant thereon. If previously payable at four instalments, it cannot be reserved at two payments. *Lord Mountjoy's case*, 5 Co. 5 b. Where ancient covenants "to grind at mills, or to pay land-tax," were not in the new leases, such new leases were held to be bad; and where the words in the power were, "reserving ancient usual and accustomed rents, heriots, boons, and services," the tenants having in former leases covenanted to keep in repair, which covenant was omitted in the new leases, such leases were held to be void for want of that covenant; and the principle is, that the estate must come to the remainder-man in as beneficial a manner as ancient holders held it. *Earl of Cardigan v. Montague*, cited

**manors, messuages, hereditaments, and premises hereinbefore devised, and all or any of the**

1 Burr. 122. Also where the power required a condition of re-entry on non-payment of rent for twenty-one days, a lease granted with condition of re-entry on non-payment of rent for twenty days, in case no sufficient distress could be found, was held not to be a good execution of the power; because the conditional power of re-entry was less beneficial to the remainder-man than an absolute power of re-entry on non-payment of rent. *Coxe v. Day*, 13 East, 118. *Doe dem. Earl of Jersey v. Smith*, 3 Moore, 339, and 1 Taunt. & Brod. 97. A lease made by the tenant for life, not warranted by the power, being absolutely void as to the remainder-man, and not merely voidable, the acceptance of rent by the remainder-man will not render the lease valid. But if the remainder-man accept rent after the death of the tenant for life, it is an admission of the tenancy, and notice to quit will be required. *Doe dem. Martin v. Watts*, 7 T. R. 83; and see *Symson v. Butcher*, Doug. 51. *Goodright dem. Carter v. Straphan*, 1 Cowp. 201. *Denne dem. Brune v. Rawlins*, 10 East, 261. But where there is no fraud on the remainder-man, and the execution of the power be defective, equity will give relief, if the lessee is in the nature of a purchaser. *Shannon v. Bradstreet*, 1 Sch. & Lef. 52; and see *Doe dem. Collins v. Waller*, 7 T. R. 478.

It is desirable that the premises over which the power is to ride should be expressly described. Where a power was given to construction make a lease or leases for three lives, or for twenty-one years, of powers "all or any part of the premises in the indenture or fine comprised, at such yearly rents or more as the same were then let at;" it was held, that a lease of a mansion house and demesnes, which had not previously been let, was void; for though the power was given indefinitely to make leases of all or any part of the premises comprised in the indenture, yet those words were restrained in the latter part of the sentence to "such leases where the accuser yearly rents or more were reserved." *Baggott v. Oughton*, 8 Mod. 250. The words in such case shew that the power is meant to extend only to what has been usually let. By that means the heir enjoys all the premises just as they were

mines now opened, or hereafter to be opened, in and upon any part of the same manors, mes-

held and enjoyed by the ancestor, the tenant for life ; he has the occupation of what was always occupied, and the rent of what was always let. *Right* dem. *Bassett v. Thomas*, 3 Burr. 1441. But where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification. In *Cumberford's* case, 2 Roll. Abr. 262, pl. 15, the power was to grant leases of the premises, or any part thereof, so that such rent or more be reserved upon each lease, as was reserved or paid for the same within two years then next before ; part of the land had not been let within the two years ; but it was held that such part might be let, reserving what rent the lessor pleased ; for it appeared by the generality of the words, that he had power to lease all the lands. *See Good-title* dem. *Clarges and Earl Ferrers v. Funucan*, 2 Doug. 570. Where the terms "usually let," are used as descriptive of the lands to which the power is intended to apply, lands which have been twice or thrice let are within the power, 2 Roll. Abr. 261; but not land which has been only once let. *Ibid.* 262. Lands not demised for the space of twenty years, or twenty-one years, will not come under the description of lands usually let. *Foot v. Marriott*, 3 Vin. Abr. 429, pl. 9. *Tristram v. Lady Baltinglass*, Vaugh. 31. If it can be collected from the nature of the property, the same not having been previously demised, or from the character of the parties to whom the power is given, (as in the case of trustees who are not intended to have any beneficial interest for themselves), or from any other circumstance, that the power was not intended to go beyond what had before been demised, it will be confined to that property. *Doe* dem. *Bartlett v. Rendle*, 3 Maul. & Selw. 99.

The power should expressly declare whether the leases to be made on the execution of it are to take effect in possession or reversion, or by way of future interest. In the most ~~any~~ sense, *that* is said to be a lease in reversion which hath its commencement at a future day ; and then it is opposed to a lease in possession ; for every lease that is not a lease in possession in this

suages, hereditaments, and premises, to any person or persons, for any term of years, not

sense, is said to be a lease in reversion; but the usual construction of the term, "lease in reversion," in powers, is a lease to commence after the end of a present interest in being, and not a lease to commence at a future day. Although a power should enable a man to make leases in reversion, as well as in possession, yet he cannot make a lease in possession and another lease in reversion of the same land; but the power to make leases in reversion shall be confined to such land as was not then in possession. Where a power expressly enables a person to make leases, as well in possession as in reversion, a lease in reversion will then be good. *Whitlock's case*, 8 Co. 69 b.

Where a power was reserved to lease for any term of years not exceeding twenty-one years in possession, and not in reversion, remainder, or expectancy, and the donee made a lease to an only daughter for twenty-one years, to commence from the day of the date of the indenture, the validity of the deed was contested. The question was, whether the particle "from" would be construed exclusive or inclusive of the *terminus a quo*. If the word "inclusive" or "exclusive," had been added, the matter would have been very clear. Lord Mansfield, after reviewing all the authorities and cases which had been determined in Westminster Hall, in order of time, concluded his judgment by saying, that the ground of the opinion which he then delivered was, that "from" might, in the vulgar use, and even in the strict propriety of language, mean either inclusive or exclusive: that the parties necessarily understood and used it in that sense, which made their deed effectual: that courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them; more especially where the words themselves abstractedly may admit of either meaning. It was therefore held, that the lease was valid. *Pugh v. The Duke of Leeds*, 2 Cowl. 714: and ~~one~~ *Doe dem. Cox v. Day*, 10 East, 427. *Hatter v. Ash*, 1 Lord Raym. 84. *Bellasis v. Hesler*, 1 Lord Raym. 280. *Rex v. Adderley*, 2 Dong. 463.

It may be proper to observe, that livery of seisin is not neces-

not exceeding twenty-one years, to be computed from the making thereof, at the best yearly rent that can be reasonably had for the same, and without taking any fine or foregift for the making thereof, and so that there be contained therein a clause, in the nature of a condition of re-entry for non-payment of the rent thereby to be reserved; and so that the lessee or lessees execute a counterpart thereof, and thereby covenant for the payment of the rent thereby to be reserved; Provided, nevertheless, that no lease, to be made by virtue of the last mentioned power, of my mansion house called

Leases of certain hereditaments not to exceed minorities of tenants for life, &c.

, and the park, gardens, and pleasure grounds thereto belonging, shall exceed the minority or respective minorities of the person or persons who shall for the time being, by virtue of this my will, be entitled to the possession of the same mansion house, park, gardens, and pleasure grounds, or to the rents and profits thereof, either as tenant or tenants for life or in tail male, or in tail: Provided always, and I do hereby further declare, that it shall be lawful for every person who, by virtue of this my will, shall be tenant for life in possession of

sary to be given on a freehold lease made under a power, because the lease takes effect from the instrument by which the power is created.

Where trustees are invested with a power of leasing, they must exercise it precisely as if the estate was given to them in trust to let. *Sutton v. Jones*, 15 Ves. 588. See Sugd. Powers, *passim*.

the same manors, messuages, hereditaments, and premises hereinbefore devised, or entitled to the rents and profits thereof, and who shall have attained his or her age of twenty-one years and for the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, during the minority or respective minorities of any such tenant for life, or of any person or persons who, by virtue of this my will, shall be entitled to the possession, or to the rents and profits of the said manors, messuages, hereditaments, and premises, as tenant in tail male, or in tail, by any deed or deeds, to be sealed and delivered by him, her, or them respectively, in the presence of, and attested by two or more witnesses, to appoint, by way of ~~demise~~ or lease, all or any part of the manors, messuages, hereditaments, and premises hereinbefore devised (except my said ~~mansion house, called~~ <sup>as to certain parts of the here-</sup> ~~gardens, and pleasure grounds thereto belong-~~ <sup>ditaments;</sup> ~~ing~~), to any person or persons who shall be willing to improve the same, by erecting or building thereon any new house, or new erection, or to rebuild or repair any of the messuages, erections, and buildings whatsoever, which now are, or hereafter shall be, on the same hereditaments and premises, or any part thereof; or to expend such sums of money in the improvement thereof, respectively, ~~as~~ shall be thought adequate for any term of years not ex-

ceeding ninety-nine years, to be computed from the making thereof, at such rent, and upon such terms and conditions, as shall be thought reasonable, without taking any fine or fore-gift, but without fine or fore-gift. for the making thereof, beyond such covenants and agreements, as aforesaid ; but so that the lessees to execute counterpart. lessee or lessees execute a counterpart of the appointment so to be made to him or them by way of lease ; and be not thereby exempted from punishment for committing waste, further than is necessary for the making or effecting the buildings or improvements thereby covenanted and agreed to be made.

Power to grant leases for lives.

**CXXXI.** Provided always, and I do hereby further declare, that it shall be lawful for every person who, by virtue of this my will, shall be tenant for life in possession of the manors, messuages, hereditaments, and premises hereinbefore devised, or entitled to the rents and profits thereof, and who shall have attained his or her age of twenty-one years, and for the said [trustees], and the survivor of them, and the executors or administrators of such survivor, during the minority or respective minorities of any such tenant for life, or of any person or persons who, by virtue of this my will shall be entitled to the possession, or to the rents and profits of the said manors, messuages, hereditaments, and premises, as tenants in tail male, or in tail, by any deed or

deeds, to be sealed and delivered by him, her, or them respectively, in the presence of and attested by two or more witnesses, to appoint such of the said manors, messuages, hereditaments, and premises hereinbefore devised, as have been usually let on leases for lives, or on leases for years, determinable on the dropping of lives, or any part thereof, by way of lease, to any person or persons, for one, two, or three life or lives, or for any term or terms of years, determinable on the dropping of one, two, or three life or lives, in possession or reversion, but so that there be not at any one time more than three lives in being, whereon the hereditaments and premises respectively comprised in such appointment, by way of lease as last aforesaid, shall depend; and so that the ancient and accustomed rents, duties, and services, or more, be thereupon respectively reserved; or so that a proportionable part of such rents, duties, and services, or more, be reserved, in respect of such of the hereditaments and premises to be comprised in any one such appointment by way of lease as last aforesaid, as shall be only part of the hereditaments and premises usually comprised in any one lease, or so that the aggregate of the respective ancient and accustomed rents, duties, and services, usually reserved in respect of the respective hereditaments and premises usually demised in such leases, or more, be reserved in respect of the same here-

ditaments and premises, when they may be comprised in any one such appointment by way of lease; and so that there be contained in every such appointment, by way of lease, a condition of re-entry for nonpayment of the rent or rents thereby to be reserved; and so that the lessees be not made dispusnitable for waste; and so that they execute a counterpart or counterparts thereof, and thereby covenant for the payment and performance of the rents, duties, and services thereby respectively reserved.

Power to  
make par-  
tition.

CXXXII. Provided always, and I do hereby further declare, that it shall be lawful for the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, at the request in writing of the person who, by virtue of this my will, shall for the time being be tenant for life in possession, or entitled to the rents and profits of the said manors, messuages, hereditaments, and premises hereinbefore devised, and who shall have attained the age of twenty-one years; and for the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, during the minority or respective minorities of any such tenant for life, or of any person or persons who, by virtue of this my will, shall be entitled to the possession, or to the rents and profits of the said manors, mes-

suages, hereditaments, and premises, as tenant in tail male or in tail, to join and concur with the person or persons for the time being seised of or entitled to the other undivided part or share, or parts or shares of those hereditaments of which an undivided part or share, undivided parts or shares, is or are hereinbefore devised, in making partition of the same hereditaments, or any part thereof \*.

\* The uses which arise by the exercise of powers of sale and exchange contained in wills, are executory uses. The trustees or donees of the power only limit and appoint the uses of the land, which uses then become vested in the appointee, and all the subsisting uses are entirely determined. The use arises from the execution of the power by the trustees. The power, when thus reserved to strangers, who have neither a present nor future interest in the land, is merely collateral. Sand. 288. The land does not move from the persons exercising the power, nor is the appointee in by them, nor under them. When the powers are executed, the estates may be said to open and at once let in the uses as they come in esse.

A power of sale and exchange is in effect a power of revocation and new appointment; for the new uses and estates created under the appointment must necessarily, as to the extent of such appointment, revoke, defeat, or abridge the uses which existed, and were executed previously to the new limitation. Thus where A. on his marriage with B. conveyed lands to C. in trust for himself for life, remainder to B. for life, remainder to the heirs of their two bodies, remainder to A. in fee, with a proviso, that in default of issue of the marriage, C. should convey to such uses as the survivor should appoint. A. the survivor devised the lands to D. Lord Keeper Wright held, that though the proviso was unskillfully penned, yet it amounted to a power of revoking and limiting new uses. *Bishop of Oxon. v. Leighton*, 2 Vern. 377. It is however advis-

Power of  
sale and  
exchange.

**CXXXIII. Provided always, and I do hereby further declare, that it shall be lawful for**

able, that in the power of sale and exchange, a power of revocation should be inserted. It should also be expressly declared what uses or interests are, and what are not intended to be over-reached by the execution of the power. There seems to be no reason for exempting from the operation of the power any of the uses or interests, except those created under the powers of leasing, and of raising money by way of mortgage. Jointures and portions ought to be transferred from the settled estates to those acquired under the powers. See Mr. Butler's valuable note to Co. Litt. 271 b. But indeed, with respect to the power of leasing, it has been long established, that such power over-reaches all the estates. For if an estate be limited to the use of A. for life, with many remainders over, and a power is reserved or given to A. to make leases, or a jointure upon an after-taken wife; when A. exercises his power, it takes effect by way of limitation of a use, which entirely over-reaches and takes precedence of the other uses. *Beale v. Beale*, 1 P. Wms. 245. *Mosley v. Mosley*, 5 Ves. 248. and see Sand. 539. The nature of the powers in most instances sufficiently points out the priority in which the estates created under them are entitled. Thus a power of sale must defeat every limitation of the estate, except estates limited to persons standing in the situation of purchasers. Sug. Pow. 337.

In a power of sale it should not be declared that the trustees shall appoint to the purchaser in fee, as a doubt might be entertained whether this would warrant an appointment to uses to bar dower. It is better that the trustees should be authorised to limit such uses as will carry the contract into execution. Mr. Sugden however observes, it may be contended, independently of decision, that although the trustees of the power are only authorised by the words of it to appoint the estate to the purchaser in fee, yet they may appoint it to uses to bar dower, or in any other manner which the purchaser may direct, Sug. Pow. 449.

Power to  
make par-  
tition.

A power to make partition will not authorise a sale or exchange of an estate. But it has frequently been a question, whether

the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, at any time or times hereafter, at the request in writing of the person who, by virtue of this my will, shall for the time being be tenant for life, or entitled to the rents and profits of the said manors, messuages, hereditaments, and premises hereinbefore devised, and who shall have attained the age of twenty-one years, to dispose of, either by way of absolute sale, or in exchange for other hereditaments, to be situate in England or Wales, all or any part of the manors, messuages, hereditaments, and pre-

the usual power of sale and exchange does not authorise a partition. *Abel v. Heathcote*, 2 Ves. jun. 98. 4 Bro. Ch. Ca. 278. However, Lord Eldon, in deciding the case of *M'Queen v. Farquhar*, 11 Ves. 467, determined that a power of sale simply did not authorise a partition, whatever a power of exchange might do; and see *Attorney-General v. Hamilton*, 1 Madd. 214.

As infants cannot convey under a power without an act of parliament, it is advisable, that powers given to co-trustees should be limited to trustees and *the survivor of them*, and the executors or administrators of *the survivor*; for the statutes enabling infants, idiots, and lunatics to make conveyances, extend only to estates of which they are seised or possessed in trust, or by way of mortgage; and the statute 7 Anne, c. 19, extends only to plain and express trusts, and not to such as are implied or constructive only. *Goodwyn v. Lister*, 3 P. Wms. 387. A power of sale given to three trustees and *their heirs*, (reserving also to them a power to change the trustees) was held not to be well executed by two surviving trustees; for it was evidently intended that there should always be three trustees: and moreover a power given to several by name, cannot be executed by the survivors. *Townsend v. Wilson*, 1 Barn. & Ald. 608.

mises hereinbefore devised, for such price or prices in money, or for such equivalent in hereditaments, as to the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor shall seem reasonable.

Declaration  
that, to ef-  
fect parti-  
tion, sale or  
exchange,  
trustees  
may revoke  
uses, &c.

CXXXIV. And I do hereby declare, that for the purpose of effecting any such partition, sale, or exchange, it shall be lawful for the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, at such request in writing as aforesaid, or in respect to any partition, at their or his discretion, as the case may be, by any deed or deeds, sealed and delivered by them or him, in the presence of and attested by two or more credible witnesses, absolutely to revoke, determine, and make void all and every, or any of the uses, trusts, powers, provisoies, and declarations in this my will expressed and declared of and concerning the hereditaments so proposed to be partitioned, sold, or exchanged; and by the same, or any other deed or deeds sealed, delivered and attested in like manner, to declare and appoint any uses, estates, or trusts of the hereditaments, the uses of which shall be so revoked, which it shall be thought necessary or expedient to declare or appoint in order to effectuate any such partition, sale, or exchange as aforesaid: And I do hereby declare, that upon any such partition

or exchange as aforesaid, it shall be lawful for the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, to give or receive any money by way of equality of partition or exchange; and also that upon payment of the money to arise by sale of the said hereditaments, or any part thereof, or so to be received for equality of partition or exchange, it shall be lawful for the said [*trustees*], and the survivor of them, and the executors and administrators of such survivor, to sign and give receipts for the same respectively; and that such receipts shall effectually discharge the person or persons paying the same from being answerable for the misapplication, or from being bound to see to the application, of the money therein mentioned to be received; and that the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, shall apply the money to arise by such sale or sales, or to be received for equality of partition or exchange in or towards satisfaction and discharge of the incumbrances which, at the time of my decease shall, or may affect all or any of the manors, messuages, hereditaments, and premises hereinbefore devised, and also in or towards satisfaction and discharge of the principal sums (if any) which shall then affect all or any of the same manors, messuages, hereditaments,

Direction as to the application of the money  
of incumbrances,

and premises, by virtue of any charge made thereon by this my will, or to be made thereon in pursuance of any of the powers contained in this my will; and shall lay out the residue (if any) of such money in the purchase of freehold estates of inheritance, or of copyhold or leasehold estates convenient to be held therewith, or with any of the hereditaments and premises hereinbefore devised, or so to be purchased or received upon partition or exchange as aforesaid; and every such purchase shall be approved of by some writing, under the hand or hands of the person or persons for the time being entitled under this my will to the possession, or to the rents and profits thereof, in case the same be then actually purchased and settled to the uses hereinafter directed, if such person or persons be of the full age of twenty-one years; but if such person or persons respectively, shall be under that age, then every such purchase shall be made at the discretion of the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor; and that they the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor, shall settle and assure, or cause to be settled and assured, the estates so to be purchased, or to be received upon partition or exchange, as hereinbefore is mentioned, to the uses, upon and for the trusts, intents, and purposes, and with, under, and

to be settled  
upon same  
uses as the  
heredita-

subject to the powers, proviso~~e~~s, and declar-a-ments,  
 tions in this my will expressed and declared of <sup>which may  
 be sold, &c.</sup>  
 and concerning the hereditaments which shall  
 have been so sold, partitioned, or exchanged  
 as aforesaid, or as near thereto as the nature  
 and quality of the estates and intervening acci-  
 dents will then admit of; yet so that if any of  
 the estates so to be purchased shall be held  
 for lease or leases for years, the same, as to the  
 effect or purpose of transmission, shall not vest  
 absolutely in any person hereby made tenant  
 in tail male, or in tail, unless he or she shall at-  
 tain the age of twenty-one years. And I  
 do hereby direct, that until a proper pur- Till pur-  
 chase or proper purchases shall be found, <sup>chases</sup> made, the  
 in which the money to be laid out in the pur- money to  
 chase of estates as aforesaid shall be invested, <sup>be invested</sup> in securities.  
 the said [*trustees*], and the survivor of them,  
 and the executors or administrators of such  
 survivor, shall invest the same money, in their  
 or his names or name, in the parliamentary  
 stocks or public funds of Great Britain, or at  
 interest on government or real securities in  
 England or Wales; and shall and may, from  
 time to time, alter and vary the same, as they  
 or he shall think proper and expedient, and  
 shall pay the interest and dividends of the said  
 sums of money, stocks, funds, and securities,  
 to the person or persons who would be entitled  
 to the rents and profits of the estates so to be

purchased as aforesaid, if the same be then actually purchased and settled.

Devide of  
mortgaged  
estates.

CXXXV. And I give, devise, and bequeath all the estates vested in me, on any trusts, or by way of mortgage, and which I have power to dispose of by this my will, with their appurtenances, unto the said [trustees], their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively; Upon trust, to hold or dispose of the said trust estates, in the manner in which they ought to be held or disposed of, pursuant to the said trusts; and upon payment of the money secured on mortgage, to convey or assign the estates in mortgage to the person or persons entitled thereto for the time being. And I declare that the money secured upon such mortgages, shall be considered and taken as part of my personal estate \*.

As to devise  
of mortgag-  
ed estates.

\* Lands mortgaged are considered in equity merely as security for a personal debt. The beneficial interest, which is in fact nothing but the money due on the mortgage, will pass by a residuary bequest of personal estate; but the legal estate in lands mortgaged in fee can only be devised by will executed according to the statute of frauds. It has been laid down, that lands mortgaged in fee to a testator do not pass under a general devise of "lands, tenements, and hereditaments," or "real estate." *Wince v. Littleton*, 1 Vern. 3. *Litton v. Russell*, 2 Vern. 621. Lord Hardwicke, in *Castbore v. Scarfe*, 1 Atk. 605, said, that, by a devise of "all lands, tenements, and hereditaments," a mortgage shall not pass unless the equity of redemption be foreclosed.

CXXXVI. I appoint [ ] executors of this Appoint-  
ment of

The insertion of a particular devise of mortgaged estates ought not executors. to be omitted. Yet Mr. Sanders, in his note to the last-mentioned case, argues, that the legal estate would pass by the devise of "lands, tenements, and hereditaments." He seems to consider, that the meaning of Lord Hardwicke merely was, that a general devise of lands, tenements, and hereditaments, was incompetent to pass the beneficial interest. It may not be improper to observe, that if the beneficial interest in mortgages should pass by will, either by a residuary clause or specific bequest; and the legal estate of lands mortgaged in fee should, in default of a devise thereof, be permitted to descend to the heir at law of the testator, he would be considered as trustee for the person to whom the mortgage money was bequeathed. *Attorney-General v. Meyrick*, 2 Ves. 44. *Ex parte Morgan*, 10 Ves. 101. See also *Lord Braybroke v. Inskip*, 8 Ves. junr. 417; in which case Lord Eldon reviewed all the authorities on the subject, and delivered a luminous judgment, which may be considered as having removed all doubt in the construction of devises as to this point, and as having established a clear and satisfactory rule of construction, by which it appears, that, by a will, containing words large enough, and no expression in it authorising a narrower construction than the general legal construction, nor any such disposition of the estate as was unlikely for a testator to make of any property not, in the strictest sense, his own, and where the question of intention cannot be embarrassed by any reasoning upon the purpose or objects, or the person of the devisee; mortgaged and trust estates will pass, although in the will there may not be any declared intention of the testator to devise the mortgaged or trust estates. Though a general devise will commonly pass a trust or mortgaged estate, yet it will not, if any intent appear to treat it in a manner inconsistent with the nature of trust property. *Wall v. Bright*, 1 Jac. & Walk. 498.

It is therefore prudent to insert a devise of such estates according to the form in the text; and particularly as, in case of a general devise of real estates, if a testator charge the same with debts, legacies, or annuities, by which an intention appears inconsistent with a devise of trust or mortgaged estates, such estates will not pass.

my will \*. And I declare, that it shall be law-

Who may  
be appoint-  
ed to the  
office of  
executors.

\* All persons are capable of being executors who are capable of making wills; and many others besides, as *femes covert* and infants, nay, even infants unborn, or *en ventre sa mere*, may be made executors. But no infant under seventeen years of age can act as an executor; until which time administration must be granted to some other *durante minore aetate*. In like manner, administration may be granted *durante absentia*, or *pendente lite*, when the executor is out of the realm, or when a suit is commenced in the Ecclesiastical Court touching the validity of the will. 2 Bl. Com. 503.

Executor  
must act in  
order to  
claim legacy  
given to him  
in such  
character.

It has not been decided, whether an executor, dying at a distance, without knowing that he was appointed an executor, or manifesting any intention to take upon him the trust, would be entitled to a legacy not given to him as a mark of personal regard merely, but as a reward for taking upon him the execution of the trust. *Harrison v. Rowley*, 4 Ves. 215. But an executor cannot claim his legacy without acting, or at least proving the will. *Read v. Devaynes*, 3 Bro. C. C. 95; for nothing is so clear as that, if a legacy is given to a man as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor. *Harrison v. Rowley, supra*. If an executor notify his intention of accepting the trust, but dies before probate is granted, he will be entitled to the legacy given for his care and loss of time in the execution of the trusts reposed in him. Had there been any circumstance to shew he was backward in undertaking the trust, he would not be so entitled. *Brydges v. Wolton*, 1 Ves. & Bea. 134. An executor, renouncing probate, cannot claim a legacy given to him as executor. *Stackpoole v. Howell*, 18 Ves. 417. *Din v. Reed*, 1 Sim. & Stu. 237.

Effect of  
appoint-  
ment of  
creditor to  
the office  
of executor.

If a person, indebted to another, makes his creditor or debtor his executor, or if such a creditor obtain letters of administration to his debtor, the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself before any other creditors, whose debts are of equal degree. This is a remedy by the mere act of law, and grounded upon this reason, that the executor cannot, without an apparent absurd-

ful for my executors to pay any debts claimed Authority  
from my estate, upon any evidence they shall to pay debts,

ity, commence a suit against himself as a representative of the deceased, to recover that which is due to him in his own private capacity; but having the whole personal estate in his hands, so much as is sufficient to answer his own demands, is by operation of law applied to that particular purpose; else, by being made executor, he would be put in a worse condition than all the rest of the world besides; for, as he can commence no suit, he must be paid the last, and of course might lose his debt, unless he be allowed to retain it. *Cock v. Goodfellow*, 10 Mod. 496. But an executor cannot retain his own debt in prejudice of those of a higher degree. For the law only puts him in the same situation as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done whilst debts of a higher degree subsisted. Neither shall one executor be allowed to retain his own debts in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion. But an executor, of his own wrong, shall not in any case be permitted to retain.

In *Carey v. Goodinge*, 3 Bro. Ch. Ca. 110, Lord Thurlow held, Effect of as a settled point in equity, that the appointment of the debtor to be appoint-  
executor was no more than parting with the action, and declared it ment of  
a trust for the next of kin. Some books say the action is gone, the office of debtor to  
some say the debt is gone, and some say the debt remains; but executor.  
they will be all reconciled by this, that the debt will be assets.  
The effect at law is, that the action is gone. *Berry v. Usher*, 11 Ves. 90. *Wankford v. Wankford*, 1 Salk. 302.

Through the medium of a court of equity, the creditors of a deceased insolvent may always be compelled to take an equal distribution of the assets. It is only necessary that a friendly bill should be filed against the executor to account; after which, the Chancellor would enjoin any of the creditors from proceeding at law. Campbell's N. P. 148.

An executor may do many acts before he proves the will, be- What acts  
cause he derives all his title from the will, the probate being on- an executor  
ly evidence of it; and his interest is therefore completely vested may do be-  
fore probate.

and compound, &c think proper to admit; and to adjust, settle, compromise, and compound all accounts, reck-

at the instant of the testator's death; and he has constructive possession from the testator's death. *Smith v. Milles*, 1 T. R. 480. He may, amongst other acts, pay or take releases of debts owing from the estate of the testator; and he may receive or release debts which are owing to it. He may also commence an action; but he cannot declare in the action before probate; for when he declares, he must produce in the court the letters testamentary. But it is a question whether he may not declare generally, making protest of the letters testamentary, though he has not obtained probate; for if oyer is demanded, it can only stay the suit till probate obtained. An executor may be sued before probate; for the rights of the creditors shall not be impeded by his delay. Com. Dig. Administration, B. 9. Payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next of kin. *Allen v. Dundas*, 3 T. R. 125.

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of A.'s executor, is, to all intents and purposes, the executor and representative of A. himself. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence. The executor of the executor of J. S. may be named directly as executor of J. S. 1 Leon. 275. But the administrator of A. is merely the officer of the ordinary, prescribed by act of parliament, in whom the deceased has reposed no trust at all; and, therefore, on the death of an administrator, it results back to the ordinary to appoint another. Consequently, the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A.

As to the authority of If an executor compound debts, due from the testator, or buy them in for less than their amount, he shall not be personally en-

onings, transactions, matters, and things depending, at the time of my decease, between

titled to the benefit of such composition; but other creditors, or an executor the legatees, or the party entitled to the surplus, shall have the to compound advantage of it.

debts.

Generally speaking, if an executor compound or release a debt due to the testator, he shall answer for the amount, and will be liable on a *devastavit*, (wasting of the assets), to answer for the amount; and on this account it is desirable to insert in every will a power for the executor to compound, &c. (*see the text*), although it is said, that if the executor appears to have acted for the benefit of the estate, he shall not be charged. 11 Vin. Abr.

432.

If an executor become bankrupt, the right of executorship is not taken away, and, therefore, strictly he may be the proper hand to receive the effects of the testator. But, however, in such case the court will, in order to secure the effects of the testator, appoint a receiver, to whom the assignees of the bankrupt must account for so much of the property of the testator as they may have got in. *Ex parte Ellis & Others*, 1 Atk. 101. If an executor become bankrupt, the assignees cannot seize the specific effects of his testator, (not even in money), which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself. *Howard & Another v. Jemmet*, 3 Burr. 1369.

If an executor waste the estate of the testator, or if he be in doubtful circumstances, the court of Chancery will, in order to protect the effects, appoint a receiver. *Strange v. Harris*, 3 Bro. Ch. Ca. 365.

If a trustee, empowered to put money to interest, let the money lie by him, he shall be accountable for interest; and if a trustee trade with the money, he shall be accountable, not for the interest only, but for the profit of the trade, because he acts at his own peril, without applying to the court of Chancery for direction and executors, in disposing of the money. *Brown v. Litton*, 10 Mod. 20. And if a trustee or executor retain money in his hands for any length of time, which he might, by application to the court, or by invest-

the property of a

testator.

Liabilities

of the

testator.

in spe

of the

testator.

the testator.

Bequest of me and any other person and persons whomsoever. And I request the said [trustees] to

ing in the funds, have made productive, he shall be charged with interest thereon. *Franklin v. Firth*, 3 Bro. Ch. Ca. 433. *Littleshales v. Gascoyne*, 3 Bro. Ch. Ca. 73. And where an executor, who was directed by a testatrix to sell ten houses, and invest the produce (after payment of debts) in government or real securities, sold the houses, and placed the money in his banker's hands, mixing it with his own money; it was held, that on the failure of the bankers, he must bear the loss; and that he was liable to pay the money to the legatees, together with interest thereon. *Fletcher v. Walker*, 3 Madd. 73; and see *Freeman v. Fairlies*, 3 Meriv. 44. *Widdowson v. Duck*, 2 Meriv. 494. If an executor vest money in the 3 per cents, he will not be liable to make good a fall in the stocks. *Franklin v. Firth*, *supra*. If one executor pay over part of the testator's effects to another executor, who embezzles the property, the former is answerable for it; and, in case of his death, his assets will be charged therewith. *Townsend v. Barber*, Dick. 366.

If an executor uses or applies the testator's property in any other way than his trust authorises or requires, the loss which accrues must be borne by himself, and the gain, if any, will be for the benefit of the *cestui que trust*. A distinction has been taken between negligence and corruption in executors, and there are many cases in which executors have been adjudged responsible for gross negligence (*crassa negligentia*); where executors had neglected to call in money lent by the testator upon bond, and the obligee became a bankrupt, the Master of the Rolls, though inclined to favor the executors, held them to be responsible. *Powell v. Evans*, 5 Ves. 839. And in a previous case of *Lowson v. Copeland*, 2 Bro. Ch. Ca. 156, an executor was charged with a debt which had not been recovered, in consequence of his neglect.

With respect to the rate of interest, at which executors are to be charged; where the trust monies are not applied according to the direction of the will, a special case is necessary to induce the court to charge executors with more than 4*l. per cent.* upon the balances in their hands. The obligation on executors to lay out balances not

accept of £to them as a  
gratuity., each, as a small acknowledgment for their care and trouble in the execution of the trusts of this my will.

wanted for the exigency of the testator's affairs is now better understood, since it has been settled that they are indemnified against any loss in laying them out in the fund which the court sanctions, the *3 per cents.* If the executor has balances which he ought to have laid out, either in compliance with the express directions of the will, or from his general duty, even where the will is silent on the subject; yet, if there be nothing more proved in either case, the omission to lay out amounts only to a case of negligence, and not of misfeasance. Sir Thomas Plumer, V. C. anxious that the rule as to the rate of interest should be clearly ascertained, reviewed all the authorities on the subject, in the case of *Tebbs v. Carpenter*, 1 Madd. 290; and to this case the reader is referred.

An executor, who is a trustee, joining in a receipt and reconveyance of a mortgaged estate, though he does not receive the money, is liable; the receipt being in evidence, no enquiry will be made as to the fact. *Scurfield v. Howes*, 3 Bro. Ch. Ca. 90. It is a general rule, that executors joining in a receipt are all chargeable. *Chambers v. Minchin*, 7 Ves. 186. Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the control of the money. That rule is now altered; whether the alteration is wholesome may be a question. It may be laid down now, that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. The former was a simple rule, that joining shall be considered as acting; but in the cases since the rule, that joining alone does not impose responsibility, scarcely two judges agree. *Walker v. Symonds*, 3 Swanst. 64. And if a trustee be privy to the embezzlement of the trust-fund by his co-trustee, he will be chargeable with the amount. *Bate v. Scales*, 12 Ves. 402. There is difference between the responsibility of trustees and executors: for trustees have all equal power, interest, and authority, and cannot act separately, as executors may, but must join both in conveyances and receipts; for one

Appoint-  
ment of  
guardian.

CXXXVII. And I do hereby nominate and appoint my said wife , during such time as she shall remain my widow and unmarried after my decease, guardian of the persons and estates of my said children, during their respective minorities; and after her decease, and in case she shall so marry, I do hereby nominate and appoint the said [trustees], and the survivors and survivor of them, guardians and guardian of the persons and estates of my said children\*. And I do hereby nominate and appoint

cannot sell without the other, or desire to receive more of the consideration money, or to be more a trustee, than his partner; and, therefore, it is against natural justice to charge them for each other's receipts; unless in case of necessity, where they so join in a receipt, that it cannot be distinguished what has been received by one and what by the other; there, from their own neglect or default, both shall be charged with the whole. As if a man should blend his money with mine—by rendering my property uncertain, he loses his own. Executors have each an absolute power over the whole; and, therefore, if they join, they trust one another. *Westley v. Clarke*, 1 Eden, 357.

Appoint-  
ment of  
guardians.

\* By the common law, a father has no right to appoint guardians by his will. That power was given by stat. 12 Ch. 2, c. 24, s. 8, whereby it is enacted, that when any person hath or shall have any children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the *father* of such child or children, whether born at the time of the decease of the father, or at that time *en ventre sa mere*, or whether such father be within the age of twenty-one years, or of full age, by deed executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall think fit, to dispose of the custody and tuition of such

the said [trustees] executors of this my last will Appoint-  
ment of ex-  
and testament. And I do hereby authorise ecutors,

child or children, for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder, other than popish recusants, and that such disposition of the custody of such child or children shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardians in socage, or otherwise. Such guardian may take into his or their custody, to the use of such child or children, the profits of all lands, tenements, and hereditaments of such child or children, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children, till their respective ages of twenty-one years, or any lesser time, according to such dispositions aforesaid; and may bring such action or actions in relation thereto as by law a guardian in common socage might do. s. 10. The act does not alter or prejudice the custom of the city of London, or of any other city or town corporate, or of the town of Berwick upon Tweed, concerning orphans, nor does it discharge any apprentice from his apprenticeship. An infant may dispose of the guardianship of his child by will executed according to the directions of this statute. *Bedell v. Constable*, Vaugh. 177.

It has been decided, that a father may, under the statute, by will, dispose of the guardianship of children born, and to be born, including children by a second wife. *Ex parte Earl of Ilchester*, 7 Ves. 384. But not of an illegitimate child. *Priestley v. Hughes*, 11 East, 1. But if a man name guardians to his natural child, the court will appoint them, (unless some particular objection to them appear), without referring it to the master to examine who are proper to be appointed guardians. *Ward v. St. Paul*, 2 Br. Ch. Ca. 583. The statute confines the power of appointing a testamentary guardian to the father only; and therefore an appointment by a mother of a guardian is absolutely void; and the infant, when of his age of fourteen, may choose a guardian in court. *Ex parte Edwards*, 3 Atk. 519. Nor can a grandfather appoint a testamentary guardian. *Roome v. Roome*, 3 Atk. 182. But

and direction as to debts, and empower my said executors to pay any debts, owing by me, or claimed from me, upon

there are instances where a *grandfather* has given his estate to his grandchild, and appointed guardians of his estate and person, and where the father did not submit to the will, the court has made the father's opposition work a forfeiture of the son's estate. But if there is any gift to the father in the will, and he submits to it, the court directs and appoints a guardian on his submission. *Blake v. Leigh*, Ambl. 306. It is a clear point in law, that a testamentary guardianship is not assignable. *Mellish v. De Costa*, 2 Atk. 14. If the guardian die, the interest absolutely determines, as if it had never been disposed of.

A mere revocation of an appointment of guardian by will may be by writing, unattested. But a writing, purporting to appoint a new guardian, and void for want of attestation, will not operate as a revocation of a previous appointment by will. *Earl of Ilchester's case, supra*. Where guardianship was entrusted to three persons, without saying, to the survivors or survivor of them, it was held to descend to the survivor. *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103. The appointment of a guardian is a bare power and trust, and is not assignable. *Bedell v. Constable*, Vaugh. 177. *Duke of Beaufort's case*, 1 P. Win. 703. The marriage of daughters determines their guardianship, but it is otherwise of sons. *Mendes v. Mendes*, 1 Ves. 90.

If a guardian should not have been appointed according to the statute Ch. II., the court of Chancery is the only proper court which has jurisdiction in the appointment of guardians, in the removal of them, and in preventing abuse of the trust.

The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a parent and child. But when the ward comes of age, the guardian is bound to give him an account of all his transactions; and also to answer for all losses occasioned by his neglect or default, but not by casual events. In equity an infant may, by *procchein amie*, sue his guardian for an account during the minority. And by the statute 4 Anne, c. 16, s. 27, an action of account is given against the executors or administrators of a guardian. See Co. Litt. 88 b. and Mr. Hargrave's notes.

any evidence thereof they shall think proper; and to accept any security, real or personal, for any debt or debts owing to me; and also to compromise or compound any debt or debts owing to me, and to allow such time for the payment thereof as to them or him shall seem reasonable.

CXXXVIII. And I do hereby nominate and Appoint-  
ment of  
appoint the said [*trustees*] executors of this my executors.  
last will and testament: And I give to each of Bequest to  
them, as an acknowledgment of his kindness in them.  
acting in the executorship of this my will, the  
sum £ . I appoint my said wife, during  
her life, and after her decease my said execu- Appoint-  
tors, and the survivors and survivor of them, ment of  
to be guardians and guardian of the persons and guardians.  
estates of my sons , during their respec-  
tive minorities. And I do hereby authorise Authority to  
and empower my said trustees to pay any debts trustees as to  
owing by me, or claimed from me, upon any settlement  
evidence they shall think proper, and to accept of accounts.  
any security, real or personal, for any debt or  
debts owing to me, and also to compromise or  
compound any debts owing to me, and to allow  
such time for the payment thereof as to them  
or him shall seem reasonable.

CXXXIX. And I declare my will to be, Authority to  
that it shall be lawful for the said [*trustees*], trustees to  
and the survivors and survivor of them, give re-  
ceipts and

indemnity to persons paying money to them. the executors, administrators, and assigns of such survivor, to sign and give any receipt or receipts for any sum or sums of money payable to them or him, under or by virtue of this my will; and that any person or persons paying to them or him any such sum or sums of money, and taking their or his receipts for the same respectively, shall not afterwards be answerable or accountable for the loss, misapplication, or non-application, or in anywise bound or concerned to see to the application of the money in the said receipts mentioned or acknowledged to be received.

Indemnity to persons paying money to trustees and executors. CXL. Provided always, and I do hereby declare, that the receipt or receipts of the said [trustees], and of my said executors, and of the survivors and survivor of them respectively, and the executors, administrators, and assigns of such respective survivor, for any money payable to them or him respectively, by virtue of these presents, shall effectually discharge the person or persons paying the same from being answerable or accountable for the mis-application or non-application thereof, or from being obliged to see to the application thereof, or to enquire into the necessity or propriety of any sale or mortgage that may be made or accepted under or by virtue of this my will.

**CXLI.** Provided always, and I do hereby Power to declare, that if the trustees appointed in this <sup>change</sup> trustees. my will, or to be appointed as hereinafter is mentioned, or any of them, or their or any of their heirs, executors, administrators, and assigns, shall happen to die, or be desirous of being discharged from, or refuse or decline, or be incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for the said , during his life, and after his decease, to and for the then surviving or continuing trustees or trustee, or the executors, or administrators of the last surviving or continuing trustee, by any deed or deeds, instrument or instruments in writing, to be by them, him, or her sealed and delivered, in the presence of and attested by two or more credible witnesses, from time to time, to nominate substitute, or appoint any person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid. And when and so often as any new trustee shall be nominated and appointed as aforesaid, all the trust estates, monies, and premises, the trustee or trustees whereof shall so die, or desire to be discharged, or refuse or decline, or become in-

capable to act as aforesaid, shall be thereupon, with all convenient speed, conveyed, assigned, and transferred, in such sort and manner, and so as that the same shall and may be legally and effectually vested in the person or persons so to be appointed as aforesaid, either solely, or jointly with the surviving or continuing trustee or trustees, as occasion shall require: To the uses, and upon and for the trusts, intents, and purposes hereinbefore expressed and declared of and concerning the said trust estates, monies, and premises, or such of them as shall be then subsisting undetermined, and capable of taking effect; and the person or persons so to be appointed as aforesaid, shall have all the powers and authorities of the trustee or trustees in whose room he or they shall be substituted.

**Indemnity  
to trustees.**

CXLII. Provided always, and I do hereby further declare, that the said several trustees hereby appointed, and to be appointed, as aforesaid, and each and every of them, and the heirs, executors, administrators, and assigns of them, each and every of them, shall be charged and chargeable respectively, for such monies only as they respectively shall actually receive by virtue of the trusts hereby in them reposed, notwithstanding their or any of their giving, or signing, or joining in giving or signing any receipt or receipts, for the sake of conformity:

And any one or more of them shall not be answerable or accountable for the others or other of them, or for involuntary losses: And also <sup>And authority to retain certain expenses.</sup> that it shall and may be lawful for them, with and out of the monies which shall come to their penses, &c. respectively hands by virtue of the trusts aforesaid, to retain to and reimburse themselves respectively; and also to allow their respective co-trustees or co-trustee, all costs, charges, damages, and expenses which they, or any of them, shall or may suffer, sustain, expend, disburse, be at, or be put unto, in or about the execution of the aforesaid trusts, or in relation thereunto.

CXLIII. And I do hereby revoke\* and <sup>Revocation of will.</sup> make void all former wills and codicils by me at any time heretofore made, and declare this to be my last will and testament.

\* No devise in writing of lands, tenements, or hereditaments, How a devise may be revoked. nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing, declaring the same; or by burning, cancelling, tearing, or obliterating the same, by the testator himself, or in his presence, and by his direction and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or by his direction, in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same. Stat. 29 Ch. II. c. 3, s. 6. Previous to the passing of this statute, it was held, that revocation of a written will might be by

parol, although the first will was not cancelled or defaced. Dyer, 310 b. pl. 81.

There are express revocations of a will, which must pursue the directions of the statute, by burning, cancelling, &c.; and there are also virtual revocations, notwithstanding the enactment of the statute.

Constructive revocation.

Lord Mansfield declared (3 Burr. 1491), that constructive revocations, contrary to the intention of the testator, ought not to be indulged; and that some overstrained resolutions of that sort had brought a scandal upon the law. Lord Hardwicke also said, that a court of equity does not favour revocations contrary to the plain intention of the testator, though the same rule as in a court of law must be observed. *Carte v. Carte*, 3 Atk. 179. And in another case (3 Atk. 746), his Lordship observed, that revocations have been determined on very nice and artificial reasons, upon an inclination the law always shews to favour an heir, and to prevent him from being disinherited, where the intention of the testator is doubtful. The suggestion may be pardoned, whether this reason given by Lord Hardwicke does not itself seem to be "very nice and artificial;" for the family of a testator may be thus deprived of the provision made for them by a will, which the testator himself might not know that he had revoked, unconscious as he might well be of "the inclination which the law always shews to favour an heir;"---but *in jure non remota causa sed proxima spectatur*. It may be sufficient to say, that the rule (to adopt the words of Lord Mansfield), being established, must be adhered to, although it is not founded upon truly rational grounds and principles, nor upon the intent of the testator, but upon legal niceties and subtlety; notwithstanding, one would wish that no such rule had ever been established, and lament that such nice subtleties should have been admitted as the ground of it.

What acts  
revoke a  
devise.

Where a man seised of an estate devises it, and afterwards conveys the estate entirely away, though he takes it back by the same instrument, or by a declaration of uses, it is a revocation, because it is said in the books, "he has parted with his whole estate." The estate must remain in the same plight, and unaltered to the time of the testator's death; for any alteration or

new modelling will make it a different estate, and occasion a different construction at law, unless in some exceptions. Even an act which is incomplete, and void at law, has been in several instances held to be a revocation of a will; as, for instance, a feoffment without livery; for it has been said to import an intention in the testator to revoke. *Beard v. Beard*, 3 Atk. 72. *Sparrow v. Hardcastle*, 3 Atk. 802. It is therefore firmly settled, that where there is an interruption of the seisin, or the estate becomes in any manner different from what it was before the making of the will, such alterations operate as revocations of prior devises. Thus where A. seised in fee, agreed by marriage articles to settle his estates so as to secure his intended wife's jointure and the portions of younger children, and subject thereto upon his eldest son in tail male; he then devised those estates in fee, in case he had no issue, and (subject to any jointure which he might make) to trustees for a term of years, upon certain trusts; and afterwards conveyed the estates, by lease and release, to trustees and their heirs, in pursuance of the articles, in trust for himself in fee till the marriage; and afterwards for the various purposes of the marriage articles; and in default of issue of the marriage, and subject to a term for securing the jointure to the use of himself in fee; he afterwards married, and died without issue: it was held, that the deed of settlement, whereby he departed with the whole estate, operated as a revocation of the will, though he took back a fee by the same instrument, and though it was consistent with the provisions of the will. *Goodtitle dem. Holford v. Otway*, 2 H. Bl. 516. 1 Bos. & Pul. 576. 7 T. R. 399. It is now settled, that if a man devises a fee simple estate, and afterwards, for securing a jointure, (instead of simply limiting a jointure, which would be quite enough), conveys the estate, out of which the jointure is to come, to the use of himself for life; with remainder, to the intent and purpose that the intended wife may take a rent charge, and to the use, that she may distrain, (for that may be limited by way of use), and then to enter; with remainder to trustees for ninety-nine years, the better to secure the jointure; with the ultimate remainder to himself and his heirs; although the moment he takes the seal off the wax, his old estate is, *co instanti*, vested in himself, that is a revocation of the will.

Lord Chief Justice Eyre's argument, in *Cave v. Holford*, (3 Ves. 650), is no doubt extremely able; but it is settled, that if a man devises his freehold estate, and afterwards makes a settlement with a limitation to his own right heirs, that indeed is his old use; yet, because he takes it back by a conveyance, which purports to pass his whole estate, it is a revocation. See the Lord Chancellor's judgment in *Vawser v. Jeffery*, 2 Swanst. 273. A man makes a devise of his land, and then makes a feoffment, and takes back an estate in fee, and dies; this land will descend to the heir, and shall not pass to the devisee, without express agreement that he desired his first will should take place. And where a man scised in fee of land, devisable by will, within an ancient borough, made his last will when he had two sons; and when they were dead, he aliened the land in fee, took back an estate in fee, and died, and without any new agreement to this will; it was holden void, because the alienation was a disagreement to it; and without another new and express agreement, this shall not be taken as his last will, because it was once revoked. Dyer, 143 b. Suppose a man makes a will according to form, and afterwards sells or conveys away the lands he had devised to other persons; notwithstanding the form of revocation prescribed by the statute is not pursued, yet it is a virtual revocation; for it is not absolutely necessary that a deed should have witnesses; it is good without it. And where the thing devised is extinguished or destroyed by the testator in his life-time, an implied revocation takes place; and this is founded upon the maxim of law, *cessante causâ cessat effectus*. *Brudenell v. Boughton*, 2 Atk. 271. The case of a feoffment, where the testator takes back the old use, is a prodigious strong case. That construction must arise from a presumed intention that the testator would not have made a new conveyance without an intention to revoke his will; but it must be understood with some restrictions and limitations. If the conveyance or recovery be for a particular purpose, then it shall revoke no further than to answer that purpose; as where a testator creates an estate for years or for life in the lands devised, it shall operate no further. I find no authority (said Lord Hardwicke in *Villiers v. Villiers*, 2 Atk. 72) whatever at law, (and it depends upon the construction of the law), that a de-

mise of a lease for years to the same person to whom the fee is devised, and which commences in the life of the devisor, is a revocation of the fee. The same conveyance which would be a revocation of a devise of a legal estate, would be equally a revocation of a devise of an equitable estate, and it would be very dangerous to property if it were otherwise; but still the same rule holds as at law; if for a particular purpose only, then it shall be understood to be a revocation *pro tanto* only. Suppose a man seised in fee of an estate, devises the same, and afterwards, on a settlement by lease and release, takes an estate to himself for life with a limitation to a son, when born, and the heirs of his body, without any trustee to preserve contingent remainders; it might be said this was for a particular purpose, to let in a son, when born, and did not, in the mean time, make any alteration of the former estate; but this has been clearly held to be a revocation of the will. *Parsons v. Freeman*, 3 Atk. 749. *Lord Lincoln's* case, Eq. Ca. Abr. 411, turned upon a conveyance by Edward Earl of Lincoln, to trustees, in consideration of an intended marriage with Mrs. Calverly; and though it was proved that there never was any intention of such marriage, but a mere whim of the Earl, yet it was determined, with great deliberation, in the court of Chancery, and afterwards in the House of Lords, to be a revocation of his will. The courts have gone still further, and held, that if a man, who was seised in fee, but thinking he had only an estate tail, suffer a recovery in order to confirm his will, yet this is a revocation of it. *Sparrow v. Hardcastle*, 3 Atk. 803. If a tenant in tail, remainder to himself in fee, devise the lands, and afterwards suffers a recovery to the use of himself in fee, and dies without issue male, this is a revocation of the will. *Marwood v. Turner*, 3 P. Wms. 163. A fine, levied by a testator subsequent to his will, operates as a revocation of such will. *Parker v. Biscoe*, 3 Moore, 24; and see *Doe dem. Dilnot v. Dilnot*, 2 New Rep. 401. *Lushington v. Bishop of Llandaff*, 2 New Rep. 491.

In all the cases where there is a conveyance of the whole estate As to re-in law, which is only meant as a security for money, the revocation shall only be for the particular purpose, to let in the in-*pro tanto*.  
X  
brance; for the testator himself has drawn the line how far the

revocation shall go, and his intention is plainly shewn. *Haikness v. Bayley*, Prec. Ch. 515. But if the lands which were devised to one in fee, had been afterwards mortgaged to the same person, the revocation would be complete. *Ibid.*

A mortgage for a term of years, made subject to a will, is, in point of law, only a revocation *pro tanto*; but mortgages in fee, though otherwise at law, are, in equity, considered only as partial revocations. The excepted cases out of the general rules of revocations, have been confined to mortgages and securities for money, and to conveyances for raising money to pay debts; because such deeds are conveyances for a particular purpose, and are pledges for money only; and though the conveyance be of a real estate, yet, in the consideration of a court of equity, the thing conveyed is considered merely as a personal interest; for it has no quality of real estate, and, therefore, is no revocation of the devise of real estate at all; the testator having only created a chattel interest; and it is the same thing as if he had created a term for years for a particular purpose. *Sparrow v. Harcastle*, 3 Atk. 804. *Hull v. Dunch*, 1 Vern. 329. *Vernon v. Jones*, 2 Vern. 241. Lord Eldon, observing upon this doctrine of equity, said, as to mortgages, conveyances for payment of debts, and other conveyances to secure merely personal interests, it is perhaps stated too generally, that they are not revocations beyond the purpose. What Lord Hardwicke rests the doctrine on is this, that a court of equity looks on a conveyance for securing a sum of money, whatever is the form of the conveyance, as a security only; but if a man conveys the whole of his estate, taking back an estate for life to another, or giving an estate for life to another, that is a revocation. I have no conception that this doctrine of equity, in cases of conveyance for payment of money, has ever been applied, except where the conveyance is considered only as a security for payment of money; though a conveyance for a particular purpose will necessarily operate as a revocation no further than the particular purpose requires; yet, if the conveyance goes beyond what the particular purpose requires, that will be a revocation. *Pawser v. Jeffery, supra*. A bargain and sale without enrolment, a feoffment without livery of seisin, imperfect conveyances, though not capable to pass the estate, would amount

to a revocation, on the ground of evidence of intention. *Ibid.* The Lady Anderson, *cestui que trust*, devised to Mr. Harrison, and then directed her trustees to make conveyances to other trustees for her and her heirs, and died without any new publication of her will. This was held by Lord Nottingham to be a revocation; for devises of equity are as revocable as devises of land; and therefore when the testator does any act, either inconsistent, or in any way working upon the thing devised, his intent is presumed to be changed, without a new publication. *Elton v. Harrison*, 2 Swanst. 276, n.

The renewal of a chattel lease, after the testator has executed his will, revokes the bequest thereof, if the testator expresses himself in the present tense: as it must relate to what is in being at the time of making the will, and can mean only the first lease, and the term to come in it; "but persons who are acquainted with the proper method of conveying their estates by will, give in this manner 'all the estate, right, and interest which shall have to come in this lease at the time of my death,' or by a general devise of the residue;" in such instances the renewed leases will pass. *Abney v. Miller*, 2 Atk. 598. If, therefore, the specific lease in being at the execution of the will be bequeathed, a subsequent renewal of that lease is a revocation of the devise. See *Rudstone v. Anderson*, 2 Ves. 418. *Attorney-General v. Downing*, Ambl. 573. But if the bequest is not limited, but is sufficiently general to pass the future interest in renewed leases, a subsequent renewal is not a revocation. *Carte v. Carte*, 3 Atk. 173. *Adean v. Templar*, 3 P. Wms. 168. It is therefore clear, that if a testator simply bequeaths a lease, of which he is possessed at the making of his will, and afterwards renews that lease, the legatee is not entitled to the benefit of the new lease; for the new lease is not given to him, but the old lease only, which is deemed and gone. It is equally clear, that a testator may, if he please, in the case of a chattel lease, give not only the actual lease of which he is possessed at the making of his will, but such renewed or other lease of the same premises as he happens to be entitled to at the time of his death. In every case therefore where the lease has been renewed by the testator after the making of his will, the true enquiry is, whe-

ther it appears [redacted] the will to have been the testator's intention that the legatee should take not merely the actual lease, if it subsisted at his death, but any renewed or other lease of the same premises, which he might then happen to be possessed of. *Colegrave v. Manby*, 6 Madd. 72. *Marwood v. Turner*, 3 P. Wms. 163. *James v. Dean*, 15 Ves. 238. The renewal of a lease *pur autre vie*, is in all cases a revocation of a previous devise thereof, because the interest is freehold. *Marwood v. Turner*, 3 P. Wms. 170. 2 Atk. 596. The bankruptcy of a testator does not revoke a devise of those parts of the estate which remain after payment of the debts; thus if a man make a will, having real property, and become bankrupt, and die, the devisee will be entitled to the surplus out of the estate devised. *Charman v. Charman*, 14 Ves. 580. It has been long settled, that a devise is not revoked by merely taking the legal estate, and doing no more; that doctrine is stated in Roll. Abr. 616, pl. 3; and though that case is opposed by *Putbury v. Trevilian*, Dyer, 142 b., no doubt can now be admitted on a point that has been long at rest.

A partition between tenants in common operates upon the entire estate; yet it is held, that such partition is not a revocation of a prior will. *Risley v. Baltinglass*, T. Raym. 240. But if a fine be levied, not merely to establish the partition, and the estate in the land is altered, a former devise will then be revoked. *Tickner v. Tickner*, cited 3 Atk. 742. *Luther v. Kidby*, 3 P. Wms. 170, n.

When marriage will amount to a revocation. Marriage alone will not revoke a will; but if connected with the birth of a child, it will amount to a presumptive revocation. Lord Kenyon, (*Doe dem. Lancashire v. Lancashire*, 5 T. R. 49), said, a tacit condition arises on the part of the testator, at the time of making the will, that it should not subsist in the event of such a change in the state of his family. This presumption may however be rebutted. It may be shewn by some act or declaration, clear and unequivocal, that the party considered the will as an operative will. Long after it had been settled by decisions of the ecclesiastical court, with the concurrence of common law judges sitting in the court of delegates, that marriage and the birth of a child would amount to a revocation of a will of personal property, it remained a doubt whether such an alteration

of circumstances would have the same effect with regard to a will of real estate; but it is now settled, that even a devise of land may be revoked by what Lord Kenyon calls a total change in the situation of the testator's family. What shall be deemed such a total change, may be matter of controversy in each new case: but all the cases in which hitherto wills of land have been set aside upon this doctrine, have been very simple in their circumstances, and such as, when the doctrine was once received, could admit of no doubt with respect to its application. In all of them the will has been that of a person, who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been, to let in such after-born heir to take an estate disposed of by a will made before his birth. The condition implied in those cases was, that the testator, when he made his will in favour of a stranger, or more remote relation, intended that it should not operate, if he should have an heir of his own body. See the decision of Sir William Grant, Master of the Rolls, *Sheath v. York*, 1 Ves. & Bea. 397. But if the will contain a provision for children, (if the testator should have any); subsequent marriage and the birth of children will not have that effect, because the objects are contemplated and provided for. Thus, where a testator by will gave an annuity to a woman with whom he cohabited, and directed his trustee and executor, out of his real estate, in case he should have any child or children by her, to raise a sum of money for the benefit of his said children; the testator afterwards married the same woman, and had several children by her; it was held that the will was not revoked. *Kenebel v. Srafton*, 2 East, 530. In this case Lord Ellenborough said, "upon whatever grounds the rule of revocation may be supposed to stand, it is on all hands allowed to apply only to cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This cannot be said to be the case where the same persons, who, after the making of the will, stand in the legal relation of wife and children, were before particularly contemplated and provided for by the testator, though under a different character." With respect to this decision, Lord Eldon has

observed, that there was nothing upon the face of the will raising a necessary implication that legitimate children were not to take, or that legitimate and illegitimate children could not take together: if the court had thought that those words had meant illegitimate children, the necessary effect of the subsequent birth of children would have been, that the will must be considered as revoked; it might be conjectured that the testator meant illegitimate children, if he did not marry; yet, notwithstanding that might be conjectured, the opinion of the court was, that where an unmarried man, describing an unmarried woman as dearly beloved by him, does no more than make a provision for her and children, he must be considered as intending legitimate children, as there is not enough upon the will itself to shew that he meant illegitimate children; and such intention must appear by necessary implication upon the will itself. But if the will itself does not prove that the testator meant an illegitimate child, no person, except a legitimate child, can take under the same. The will must prove that illegitimate children are intended; and extrinsic evidence can be received only for the purpose of collecting who had acquired the reputation of being children of the person named in the will. *Swaine v. Kemerley*, 1 Ves. & Bea. 469. Thus, in *Wilkinson v. Adam*, 1 Ves. & Bea. 422, where it appeared from the will itself that the testator could not mean any but illegitimate children, and also that he meant to provide for them, it was held, that therefore such children were entitled to take as devisees. The case was this, the testator being a married man at the date of his will, his wife then living and having no legitimate children, it was proved, as a fact, that he had three infant children born of a woman named Ann Lewis, which three children had gained the reputation of being his natural children. He (the testator) expressed in his will, that it was his earnest wish and desire that the observations and directions which he should leave in a written book for the better improvement of his estates and carrying on the different works, as well as other matters, should be followed and attended to as much as if they were inserted in that his will. The testator republished the will, after he had in the book expressly stated who were the individuals he meant by the description given in his will of certain devisees, but this declaration was not at-

tested by three witnesses. The Lord Chancellor said, that it was impossible, upon the principle of the case of *Smart v. Prujean*, 6 Ves. 560, to maintain that the book was part of the will as to the real estate, and that therefore it was necessary to consider the testator's meaning, as it was to be collected agreeably to the rules of law upon the will itself. The rule cannot be stated too broadly, that the description "child," "son," "issue," must be taken *prima facie*, to mean legitimate "child," "son," or "issue;" but the question in this case was, whether it appeared by sufficient description or necessary implication that the testator did mean these illegitimate children. Upon the contents of the will, the testator was proved to have intended illegitimate children; and therefore upon the will itself, without looking at the book, his Lordship decided that they were entitled to take as the devisees of the testator. And see *Gordon v. Gordon*, 1 Meriv. 151. *Woodhouselee v. Dalrymple*, 2 Meriv. 419. *Bayley v. Snellham*, 1 Sim. & Stu. 78.

In the before-mentioned case of *Sheath v. York*, the testator, who was a widower, having a son and two daughters, gave all his real and personal estate in trust, subject to debts, for the children. He afterwards married a second wife, by whom he had issue one daughter: Sir William Grant said, that the devise of the real estate was not revoked, for upon no rational principle could the testator be supposed to have intended to revoke his will on account of the birth of other children; those children not deriving any benefit whatsoever from the revocation, which would have operated only to let in the eldest son to the whole of that estate, which he had, by the will, devised between that eldest son and the other children of the first marriage. The ecclesiastical court did indeed decree, that this will was revoked as to the personal estate; but such decision was in opposition to the case of *Thompson v. Shephard*. The observation may be excused, that the case of *Thompson v. Shephard*, cited 1 Phill. Rep. 343, does not appear to have been an arbitrary decision unfounded upon principle, as the expression of Sir William Grant would seem to insinuate. It was proved, on the contrary, that there were letters and declarations of the testator, by which it was completely established, that it was his intention that the will should not be revoked.

The cases of *Emerson v. Boville*, and *Hollway v. Clarke*, 1 Phill. Rep. 339—342, have established, that in the ecclesiastical courts, so far as respects personal estate, over which alone those courts have jurisdiction; the will of a widower made in favour of children of a former marriage must, unless the presumptive revocation is repelled by circumstances, be considered as revoked by his second marriage and the subsequent birth of a child, and that such will shall not revive by the death of the child of the second marriage during the life of the testator, unless it were republished or revived by some act.

A will made by a married man having children, is held to be revoked by the subsequent birth of other children left unprovided for, aided by other circumstances concurring clearly to shew, that it was not the intention of the deceased that the will should operate; the court taking the subsequent birth of issue as the essential basis of the proof, accompanied by the other concurrent circumstances of the deceased, that the will should not take effect. *Johnston v. Johnston*, 1 Phill. Rep. 447. In the very elaborate judgment of Sir John Nicholl in this case, the rule with respect to implied revocations is traced up to its origin; and the authority upon which the rule stands, and the principles upon which it is founded, are explained. The learned judge, after reviewing various established cases, decided in favour of presumptive revocations; and referring to some of the cases in which the presumption has been considered as rebutted, viz. *Brown v. Thompson*, 1 Eq. Ca. Abr. 413. *Brady v. Cubitt*, 1 Doug. 31. *Kenebel v. Scrafton*, 2 East, 530. *Ex parte Earl of Ilchester*, 7 Ves. 348. *Sheath v. York*, 1 Ves. & Bea. 390, proceeded in his judgment by observing, that in all these cases and in several others, the will is not absolutely revoked, though followed both by marriage and issue: on such questions, whether it be to examine if the presumption be raised, or whether it be to examine if the presumption be rebutted, the courts do always inquire into all the circumstances of the case; what then is the true sense and sound reason and foundation of the rule itself?—In looking through the several cases, the foundation upon which the presumption stands, as pretty constantly stated, is the alteration in the testator's circumstances, between the time of making his will and the time

of his death. If it stood so general as *the mere alteration of circumstances*, it would be very loose indeed. If it be added *total alteration of circumstances*, it is not much more definite. But if the case be further examined, we shall find that courts have required such an alteration of circumstances, arising from new *moral duties* accruing subsequent to the date of the will, as by necessary implication creates an *intention* to revoke. Here, then, we touch upon safer ground, and upon more solid principles. Intention is the very foundation and corner stone, the very essence of all wills. The term "will" necessarily means, that it is *testatio mentis*. Intention is the principle of *factum* and of revocation. It is the principle of revocation, whether it be direct by act, or implied by circumstances; the *animus testandi* or *revocandi* is the governing principle. By courts holding that marriage and the birth of children are not an absolute revocation, but only an implied revocation; by their enquiring into all the circumstances, it is quite obvious that they examine into and endeavour to get at the real intention; but it might be opening too wide a door if this enquiry were to be directed to every change of circumstances. Those loose rules which prevailed in Swinburne's time, are no longer admitted. Courts have therefore required, that the rule shall have for its basis a change of intention, produced by and to be presumed from some new moral obligation arising after the will was made. Marriage and issue are supposed to produce those new moral duties. Every man is presumed to intend the making of a provision for his family. In the case before the court, the learned judge stated, that it was the clear moral conviction of his mind, looking solely to the just result of the circumstances, upon the mere question of fact as to the intentions of the testator, that he had not any intention whatever, at the time of his death, that the will should operate.

With respect to parol declarations, Sir John Nicholl said, that they are always to be received with very great caution. In general, they are the lowest species of evidence; though in the ecclesiastical courts, upon questions of *factum*, and also upon questions of revocation, the declarations of the deceased are always received as corroborative evidence of intention, both of the *animus testandi* and the *animus revocandi*. The loose declarations which

a man often makes in conversation with his friends and acquaintance, are of very little weight indeed. They may on the part of the testator be insincere, or at best, the mere passing thought of the moment, and are liable on the part of witnesses to be misapprehended and misrepresented. But confidential communications, as in this instance with his wife, upon her serious representations to him respecting so important a subject, are deserving of rather more weight as evidence of the deceased's mind and intentions; and judging from those declarations, the testator does not seem to have had any strong objection even to an intestacy; for, upon her enquiring whether he intended to make a will, he answered, "that the law made the best will for a man." Yet, even upon these declarations, the court would be cautious in placing much reliance, if they were not confirmed by something more unequivocal and solid coming from the deceased himself in a different shape, and not open to any of the same objections. This confirmation was contained in a paper then before the court, written by the deceased, certainly within the last year; possibly at a later period of his life. *Johnston v. Johnston*, *supra*. On this class of implied revocations, see also the interesting and copious note of Mr. Fonblanche, Treat. Eq. 2 Vol. 353.

As to the  
revival of a  
will.

If a feme sole make a will, and afterwards marry, the will is invalid in case she die during the lifetime of the husband; for it is ambulatory, and cannot take effect till the death of the husband: but in case she survive the husband, the will is revived. *Hodsdon v. Lloyd*, 2 Bro. Ch. Ca. 534. *Rawlins v. Burgis*, 2 Ves. & Bea. 385.

Whether a will, which is revoked by another, is set up by the destruction of the second, has long been *vexata quæstio* in the courts. It was held by Sir George Leigh, as Judge of the Prerogative Court, that the execution of a second will is a revocation of the first will, though the second be afterwards cancelled; and that the cancelling of the second did not set up the first. *Ex parte Hellier*, 3 Atk. 797. It is true, that this judgment only appears incidentally on the application to the Lord Chancellor for a full commission of delegates, and there might be other circumstances appearing to the ecclesiastical court, which might amount to a revocation of a will of personal estate. But a similar question re-

lative to a will of real estate was afterwards argued in the Court of King's Bench, upon a motion for a new trial. The Court then observed, that, "as to cases of revocation of devises of land contrary to the intention of the testator, (as the case of the *Earl of Lincoln* and many more), they turned upon legal subtleties. They have been determined, and therefore must govern all similar cases: but none of them were applicable to the question then before the court. A will is ambulatory till the death of the testator: if the testator lets it stand till he dies, it is his will; if he does not suffer it to do so, it is not his will. Here he had two wills; he has cancelled the second; it has no effect, no operation; it is as no will at all, being cancelled before his death: but the former, which was never cancelled, stands as his will; now here none of those circumstances required by the statute of frauds are used in what is pretended to be a revocation of this first will; therefore the first will stands good." *Goodright* dem. *Glazier v. Glazier*, 4 Burr. 2512. An observation may be hazarded with respect to the decision in this case, that it was governed by the consideration that the second will did not contain a clause of revocation of former wills. Indeed, the absence of such clause may be fairly assumed; for the court particularly dwelt on the enactment of the statute of frauds concerning revocations; and expressly declared, that none of the circumstances thereby required had been observed. On the other hand, it must be acknowledged, that Lord Mansfield, in a subsequent case laid down, without any reservation, that if a testator makes one will and does not destroy it, though he makes another at any time, virtually or expressly revoking the former, and afterwards destroys the revocation, the first will is still in force and good. *Harwood v. Goodright*, dem. *Rolfe*, 1 Cowp. 87. In the case of *Moore and Metcalf v. De La Torre v. Moore*, in the Prerogative Court of Canterbury, and the Court of Delegates, 1 Phil. 375, 406, this important point of testamentary law came under immediate consideration. It was decided by Sir John Nicholl, and his judgment was affirmed in the Court of Appeal, that in the case then before the court, the cancellation of a second will did not revive a prior will, though of nearly similar import. During the course of the argument in the Court of Delegates, the before-mentioned *dicta* of Lord

Mansfield in *Harwood v. Goodright*, were advanced by counsel in favour of the revival of the first will; but Lord Chief Justice Abbott, who sat under the commission, said, that if it was put as an absolute proposition, that the cancelling of the second will would revive the first, cases might be put so distressing, as to make one feel a little whether it was right. Suppose a man, having a wife and one child, should make a will, leaving his property in a manner suitable to the then state of his family, that he should afterwards have six children born, and then should make a will, which he should afterwards destroy, by setting up the first will, you would leave five of the children unprovided for. And Mr. Baron Richards, another of the commissioners, thought he might venture to say, that such had not been universally considered as a decided principle of law; and his Lordship said, it is a great misfortune that *dicta* are taken down from judges, perhaps incorrectly, and then cited as absolute propositions. It may be proper to quote a few of the cases cited in the argument. A testator made his will in August, 1701; in 1712 he made another of a totally different tenor, in which his nephew was appointed executor and residuary legatee. In an excess of passion against his nephew, he burnt the latter will; he afterwards became reconciled to him, and sent for his attorney to make a new will; before the attorney arrived, he was taken suddenly ill, and died in the course of the night, calling anxiously for him. The will of 1701 was propounded, but the court pronounced for an intestacy. *Whitehead v. Jennings*, Prerog. 1701. Deleg. 1714. In *Burt v. Burt*, Prerog. 1718, a will made in 1669 was found in the closet of the deceased; it was proved that he had made another will in 1713: the only account of that will was, that the wife said she had destroyed it, having found it in a cancelled state—she was materially benefited under the existing will, and the court pronounced for an intestacy. In *Arnold v. Hoddie*, Prerog. 1765, the deceased made a will in 1753, in favour of a Miss Arnold, whom at that time he was about to marry; he afterwards quarrelled with her. In 1760 he made another will, by which he bequeathed his property to a sister; the latter will was not found at his death, nor was there complete proof of the execution of it; but his aversion to Miss Arnold was proved; and Sir George Hay pronounced against the existing will.

The result of the consideration and comparison of all the decided cases, appears to be, that the presumption at common law is in favour of a revival; and the presumption in the ecclesiastical courts is against a revival—but that either presumption may be rebutted by circumstances. *Moore v. Moore, supra.*

It appears, that by construction of law a prior will must be considered as being destroyed when the second is completed; and that after the cancellation of a second will, if it is desired by the testator that the first should be revived, there must be some act of republication or some revival by necessary implication, or something plainly to indicate such intention. *Ibid.* And this is the construction of law upon which the practitioner is bound invariably to act. It is very evident that *Glazier's* case, and *Harwood v. Goodright* have been shaken by the beforementioned decision of the Court of Delegates; for although it was justly asserted by counsel during the argument, that the Court of King's Bench has no authority whatever over the decisions of the Court of Delegates, yet it was attempted expressly to controvert the rule, that under all circumstances, where the second will is cancelled, the first will must as it were *ipso facto* revive. It was asked, would this be a rule consistent with reason? would it be desirable on grounds of public policy and justice, that a rule of this description should be stern and unbending? that there should be no limitation to this doctrine, no qualification of it whatsoever? And it may be safely asserted that the court freely concurred in these sentiments. To weaken the general authority of *Glazier's* case it was said, that the will destroyed, and the will subsisting, benefited the same person; and that there does not appear to have been before the court one single circumstance to shew, that the deceased had in the slightest degree varied from the affection he entertained for the person to whom he had bequeathed his estate. It was also contended, that the doctrine in *Harwood v. Goodright* goes no further than this, that a subsequent will, though it be found to contain a different disposition from a former will, yet if the particulars of that difference are unknown, it cannot operate as a revocation of it. If the cases of *Whithead v. Jennings* and *Arnold v. Haddie* had come before the Court of King's Bench, with a full developement of all the

circumstances which were laid open to the Ecclesiastical Courts, it can scarcely be imagined, that, in either of those cases the Court of King's Bench would have felt itself bound to have decided in favour of the subsisting wills. The case of *Hooton v. Head*, 3 Phill. 26, very lately decided, has confirmed the doctrine that the revival of a former will is to be considered as a question of intention. See also *Loxley v. Jackson*, 3 Phill. 134.

**Express revocations.** The first act of revocation mentioned in the statute of frauds is, by some other will or codicil in writing. But although a subsequent will is a revocation of a former will, it has been decided, that where the latter has not a clause of revocation, and where the wills are not contradictory to each other, they will both stand. *Hitchens v. Basset*, 3 Mod. 204. *Goodright dem. Rolfe and Wife v. Harwood*, 3 Wils. 497. 2 Bl. Rep. 937. Two inconsistent wills of the same date, neither of which could be proved to be the last executed, have been decided by the House of Lords to be void for uncertainty, and would let in the heir, if no act of the testator, subsequent to the wills, explained them so as to reconcile what otherwise would appear inconsistent. The second mode of revoking a will prescribed by the statute is, by an express declaration in writing, signed in the presence of three or four witnesses. And it is to be observed, that if the declaration of revocation be contained in an instrument, purporting to be a will, the same must be executed as a valid devise of lands; that is to say, the three or four witnesses must attest the same in the presence of the testator, which ceremony is not required in a mere declaration of revocation, the same being, by the before-mentioned clause, declared to be valid, if only signed by the testator, in the presence of the witnesses; if, therefore, the latter writing be intended to be made a will, but wants that perfection which is required by law, it shall not be intended as a writing distinct from a will, so as to make a revocation within the meaning of the act. *Eggleston and Another v. Speke al. Petit*, 3 Mod. 259. *Onions v. Tyrer*, 1 P. Wms. 343. A distinct and separate declaration of revocation must be signed in the presence of the witnesses. *Hilton v. King*, 3 Levinz, 86. But see *Denny v. Bartin and Rashleigh*, 2 Phill. 575. The third mode of revoking a will prescribed by the statute, is by burning, cancelling, tearing,

or obliterating the same by the testator himself, or in his presence, or by his direction and consent. With respect to the revocation of a will by the act of cancelling, it is an equivocal act; and in order to make it a revocation, it must be shown *quo animo* the will was cancelled; for unless that appears, it will be no revocation; as if a man were to throw the ink upon his will instead of the sand, though it might be a complete defacing of the instrument, it would be no cancelling. Or suppose a man, having two wills, of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter; such an act would be no revocation of the last will. Or suppose a man having a will, consisting of two parts, throws one unintentionally into the fire, where it is burnt; it would be no revocation of the devises contained in such part. It is the intention that must govern in such cases; and that was the ground of the determination in the case of *Onions v. Tyrer*, 2 Vern. 743. The whole question turned upon the act of cancelling being under a mistake. But Lord Cowper there says, supposing the first will had been cancelled, the testator did not mean to do so.—Why? Because the devises in the second will were precisely the same as those in the first, and to the same person; he did it therefore upon a supposition that he had executed the latter according to the statute of frauds; not with a design to revoke the devises as to the real estate. It is clear, therefore, that the ground of the determination in that case was its being a cancelling by mistake; not that the first will was revived for want of the latter being duly subscribed by the witnesses. The books make Lord Cowper add, (which would perhaps be difficult to maintain), “that even though the law held this to be a revocation, yet, under the head of accident, a court of equity would relieve.” To be sure, in order to explain any such act of cancelling, tearing, or defacing, &c. as I have before mentioned, parol evidence must be let in.—*Per Lord Mansfield. Burtenshaw v. Gilbert*, 1 Cowp. 49. See also *Bibb v. Thomas*, 2 Bl. Rep. 1043.

Where a testator in his own hand-writing made several alterations in his will, as, for instance, in a devise to trustees of all his ations and lands in possession, reversion, or remainder, (except a particular house at Bath), upon trust, to sell, &c. The exception in the

will of the house was struck out, the testator having sold the same; and in declaring the trusts of the produce of the sale, he interlined the word "fifty," so that an annuity was altered to 450*l.* The recital of his wife being *enclent*, and also a legacy of 3000*l.* to such child, whether son or daughter, were struck out, and instead thereof, he inserted these words: "I give to my two daughters, Julia Margaretta, and Augusta Ann Sutton, 2000*l.* each." The question referred to the opinion of the court was, whether by the will of the testator, as altered, obliterated, and interlined by him, any, and what part of the real estate therein mentioned, passed thereby to any person, and to whom? The learned reporter of the case observes, that he was not present at the argument of the case; but that he had been favoured with a sight of several notes of it; from which it appears, that the question made on the part of the plaintiff, was, whether the alterations and obliterations in the will did not amount to a total revocation of it, with respect to the real estate? The bequests most materially to be affected by such a construction, were the legacies of 2000*l.* to each of the daughters; as to them, the court declined giving any opinion whether they were void or not; recommending the decision of that point to be deferred till such time as the plaintiff (the testator's only son, an infant), should come of age. But as to the devise to the trustees to sell, they were clearly of opinion it was not revoked; and, agreeably to that opinion, certified to the court of Chancery in the following words: "We are of opinion that the devise of the real estates to the trustees, to be sold and converted into money, is not revoked, but continues in full force." *Sutton v. Sutton*, 2 Cowp. 812. So where a testator having duly executed a devise of lands to several trustees, as joint-tenants in fee, and afterwards having struck out the name of one of the devisees, by drawing a pen through it, a case was sent from the court of Chancery for the opinion of the court of Common Pleas; Lord Alvanley said, whatever the alteration might be, it was not an alteration arising from a new gift, but merely from a revocation. If the remaining devisees were to acquire any estate which they had not before, something beyond a mere revocation would be necessary. If, therefore, the devisees had been tenants in common, upon the erasure of one name, the

remaining two would take no more than two-thirds of the estate. It was certified that the devise of the estate to the two trustees, to whom, together with the third trustee, the estate was devised, as joint-tenants in trust, to be sold, was not revoked by the testator having struck out the name of the third trustee after the execution of the will. *Larkins v. Larkins*, 2 Bos. & Pull. 16. *Winsor v. Pratt*, 2 Brod. & Bing. 650. And where a testator devised lands to two trustees, in trust, for certain purposes, and he afterwards made several alterations in the will, and struck out the name of one of the trustees, and inserted the names of two others, but did not republish his will, it was held, that the alteration should operate as a revocation *pro tanto*, as to the trustee whose name was obliterated, leaving the devise good as to the old trustee, whose name was retained; Lord Ellenborough observing, that the facts of the case plainly shewed that the testator had no object but to change his trustee. That it would be unreasonable, when he had not indicated any intent to dispose of his lands to different purposes than those declared by his will, and when it clearly appeared that he meant to disinherit his heir at law, to infer that he designed that his will should become inoperative, and so let in his heir at law. It was better to conclude that he thought he had, by the alterations introduced, made a valid disposition of his estate to the new trustees, and that he had no design to alter his will, except so far as such obliteration or interlineation could effectuate that purpose, by substituting the persons whose names he interlined, in the stead of him whose name was struck out. *Short dem. Gastrell v. Smith*, 4 East, 419. A testator having regularly executed his will, which was attested by three witnesses, made several alterations in pencil in the body of the will, which were all pleaded to be in the handwriting of the deceased. Probate was granted of the will as altered; the Court observing that, *prima facie*, it might be supposed, under the circumstances, that the alteration was intended. They were made with considerable care. The alteration was highly probable: it was made by the testator after the death of his child, and in order to increase the provision for his widow, and could not be considered as merely deliberative. *Dickenson v. Dickenson*, 2 Phil. 173.

Conclusion. **CXLIV.** In witness whereof, I, the said A. B., the testator, have to this my last will and testament, contained in this and the preceding sheets of paper, set my hand and seal, (to wit), my hand to and at the bottom of each of the said sheets, and my hand and seal to this last sheet, and my seal at the top of the said sheets, where all the said sheets are fixed together, this day of 1826.

Attestation. **CXLV.** The writing contained in this and the preceding sheets of paper was signed \* and sealed by the above-named A. B. and by him published and declared as and for his last will and testament, in the presence of us, who have hereunto subscribed our names in his presence, and in the presence of each other.

C. D.

E. F.

G. H.

If there be two parts of a will, and the testator keeps one part himself, and deposits the other with some other person, and then voluntarily cancels or destroys the part in his own custody, it is a revocation of both. So, also, the act of cancellation or destruction is *prima facie* done *animo cancellandi*, and is a presumptive intention to revoke till the contrary is shewn. These positions have been laid down as legal presumptions; but, like all other legal presumptions, they may be repelled by evidence. *Richards v. Mumford and Freeman*, 2 Phill. 23.

How a will of personal estate may be executed. \* A testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good, provided sufficient proof can be

had that it is his handwriting. And though written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions, and approved by him, it hath been held a good testament of the personal estate; yet it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses. 2 Bl. Com. 501. There is nothing that requires so little solemnity as the making a will of personal estate according to the ecclesiastical laws of this realm; for there is scarcely any paper writing which they will not admit as such. *Ross v. Ewer*, 3 Atk. 162. A will of any share or interest in the public funds, must, however, be attested by two or more credible witnesses. See stat. 35 Geo. III. c. 14, s. 16. But a will of stocks, attested by only one witness, will be considered as creating a trust obligatory on the executor.

Devises of lands are quite of a different nature from a testament As to the chattels, being conveyances by statute unknown to the common law. The statute of wills, 32 Hen. VIII. c. 1, explained by the subsequent act 34 and 35 Hen. VIII. c. 5, gave the power of disposal of lands by will in writing. execution of wills of real estate.

An infinite number of frauds were the consequence of the construction made upon these statutes. Notes, in the hand-writing of another person, were considered as wills within the statute. Thus, in the case of *Brown against Sackville*, Dyer, 72 a. pl. 2, a man seised of lands in fee simple, holden in socage, (being sick in bed), sent for Mr. Atkins, a man learned in the law, and desired his counsel to make his will, who took notes of it, and afterwards departed from the devisor, and in the morning put the said will in writing, according to due form of law, agreeably to the said notes, and according to the said will declared unto him; it was moved, whether this was a good will or not: and by the opinion of the court, such a will was good enough, and sufficient by the statute. So the same point was doubted, upon a will whereof articles were made in the second year of Edw. *ut supra*, and read to the devisor by the scrivener, and written at length after his death, and holden as above well enough. In order to prevent the many fraudulent practices which were thus introduced, it was enacted by the statute 29 Ch. II. c. 3, s. 5, that

all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses; or that else they shall be utterly void, and of none effect.

In what manner a will may be written.

It is not material upon what matter or stuff, whether paper or parchment, or in what language, whether English, Latin, French, &c. or in what kind of hand-writing or character a devise is written, so that it be fair and legible, and the meaning be sufficiently apparent. Neither is it material whether it be written at large, or by notes, usual or unusual, or whether sums of money given be expressed at full length, or in figures, provided it be free from all doubts and ambiguity. *Cruise Dig.* Vol. 6, p. 60; and see *Masters v. Masters*, 1 P. Wms. 425. In *Rymes v. Clarkson*, 1 Phill. Rep. 22, Sir John Nicholl allowed, that a testator might write his will with a pencil, or write his will and codicil in ink, and another codicil in pencil, and that such instruments would be valid in law, provided the courts should be satisfied that he intended to do so. For instance, if he had added, "I have written this codicil in pencil, but intend it should operate as my will;" or, if it could be accounted for, by shewing that he had no other materials, as it was permitted to the dying soldier to write his will with his sword in the dust. But when the question to be decided is the previous one, whether he did intend this paper as the final declaration of his mind, and as a codicil, or whether it was merely preparatory to a more formal disposition, the material with which it is written becomes a most important circumstance. The intention of the testator, in such respect, can only be judged of and decided upon from a due consideration of all the circumstances before the court. Mr. Justice Blackstone, (Com. 2. 376), observes, in reference to the case of *Lemayne v. Stanley*, 3 Lelinz, 1, that the testator's name, written with his own hand at the beginning of his will, as, "I, John Mills, do make this my last will and testament," is a sufficient signing, without any name at

the bottom; upon which clause Mr. Christian remarks, that "writing the name at the beginning would never be considered a signing according to the statute, unless the whole will was written by the testator himself; for whatever is written by a stranger, after the name of the testator, affords no evidence of the testator's assent to it, if the subscription of his name in his own hand is not subjoined." This latter observation is of course made on the authority of the before-mentioned case in *Levinz*, where the whole of the will was written by the testator himself.

Where a will was prepared on five sheets, and the seal affixed to what is a the last, and also the form of the attestation written upon it, and sufficient execution the will was read over to the testator, in the presence of the three within the witnesses, who afterwards subscribed it, and he set his mark to statute of the two first sheets, in their presence, and attempted to set it to frauds. the third, but being unable from the weakness of his hand, said, "I can't do it, but it is my will;" after this the three witnesses went away, being desired to come again. On the following day one of the witnesses, in the presence of two other persons, (not being the two other subscribing witnesses), said to the testator, "will you sign your will?" he said, he would, and again attempted to sign the two remaining sheets, but was not able. On the next day, the testator being in a state of insensibility, one of the last-mentioned witnesses proceeded to write the form of an attestation on the second sheet, and he and the other two witnesses put their names to it in the room where the testator lay; he died two days afterwards: and the question was, whether the will was duly executed for passing lands, according to the statute of frauds. Lord Mansfield observed, that the testator, when he signed the two first sheets, had an intention of signing the others, but was not able; he therefore did not mean the signature of the two first as the signature of the whole. *Right dem. Cater v. Price*, 1 Dougl. 241. When a will is written on several sheets of paper it is usual to join them together, and for the testator to sign each of the sheets; and it appears from the last-mentioned case, that if the signing of any of the sheets is begun by the testator, such signing must be completed by him, otherwise there will not be a signature of the whole will. But it is presumed that this case will not furnish grounds for contending that it is

therefore necessary, where a will is written on several sheets of paper, that every sheet should be signed by the testator; but on the contrary, that the signing of the last sheet alone will be sufficient, if the testator does not contemplate any further execution of the will, and if the attestation is expressed accordingly. Where a will, written on three sides of a sheet of paper, duly attested, concluded by stating, that the testator had signed the two first sides, and had put his hand and seal to the last, but it appeared that he had omitted signing the two first sides, the Court of Common Pleas held, that the will was well executed; for whatever might have been his intention, at one time, of signing the former sheets, he had, by his final signature, testified that he had abandoned that intention. *Winsor v. Pratt*, 2 Brod. & Bing. 650.

It will be observed, that the fifth section of the statute of frauds, before cited, does not require that the devisor, or any other person in his presence, and by his express directions, should sign the will in the presence of the witnesses; it has therefore been held, that if the witnesses attest the will, on the acknowledgment of the testator as to the signature thereof, the same will be a valid execution. See *Grayson v. Atkinson*, 2 Ves. 454; in which case Lord Hardwicke observed, that at the time of making the statute of frauds, and ever since, if a bond or deed is executed by the person who signs it; and afterwards the witnesses are called in, and before those witnesses he acknowledges his hand-writing; such is always considered as an evidence of signing by the person executing, and is an attestation of it by them. Considering therefore the words of the act of parliament, it seems that if the testator, having signed the will, did before those witnesses declare and acknowledge he had done so, and that such was his hand-writing, such acknowledgment might be sufficient within the clause; for the act of subscribing makes no difference in the case. That further circumstance is required by the statute to make it necessary that the witnesses should certify their attestation, all of them in the presence of the testator; therefore is subscription mentioned. Nor is it necessary that the three witnesses should be all present at the same time. For where A. signed and published a will in the presence of two persons, who attested in his presence, then a third person was called in, and the testator,

shewing him his name, tells him that is his hand, and bids him witness it, which he did, and subscribed his name in the testator's presence; and, two hours afterwards, the testator tells him that which he had subscribed was his will: Sir Joseph Jekyl held this a good execution; the statute not saying that the will should be signed in the presence of three persons, and it having been determined not to be necessary that they should see him sign his name, nor that all the witnesses should sign at one and the same time. *Smith v. Codron*, cited 2 Ves. 455; see also *Ellis v. Smith*, 1 Ves. jun. 11. *Addy v. Griz*, 8 Ves. 504. *Morison v. Turnour*, 18 Ves. 183. *Gryle v. Gryle*, 2 Atk. 175. *Westbeech v. Kennedy*, 1 Ves. & Beam. 362. Where the attestation of a will was in these words "signed, sealed, published, and declared as and for his last will and testament, in the presence of us, A., B., & C.," it was objected (the witnesses being all dead), that this was not an execution according to the statute of frauds, and that the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one. But the court, on the authority of *Hands v. James*, Com. Rep. 530, said, it was evidence to be left to a jury, of a compliance with all the circumstances. *Croft v. Pawlet*, 2 Str. 1109.

It is, nevertheless, prudent that a testator should sign in the presence of the subscribing witnesses, and that the subscription of such witnesses should be not only in the presence of the testator, but of each other. It has however been decided, in further extension of the liberal construction of the sixth section of the statute of frauds, that if the testator be in a situation from which he is able to see the witnesses subscribe their names, such will be considered as a subscription in his presence; as the Courts will lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute had been complied with. Thus, where a will was signed by the witnesses in an adjoining room, having a window which was broken between it and the room where the testator was, from which he might have seen the witnesses; the Court presumed, that he therefore did see them sign. *Shires v. Glascock*, 2 Salk. 688. *Carth. 81. Hellard v. Jennings*, 1 Ld. Raym. 505. *Casson v. Dade*, 1 Bro. Ch. Ca. 99. But if (as was the case in *Wright v. Price, supra*) the testator should

be in a state of insensibility, there will be no room for such presumption, for the testator could not know whether the will which he had signed was that which the witnesses attested. He would be considered dead to all purposes or power of conveying his property. But in another case, where the jury found, that from one part of the testator's room, a person, by inclining himself forwards, with his head out at the door, might have seen the witnesses, but that the testator was not in such a situation in the room that he might, by so inclining, have seen them, it was held, that the will was not duly attested. *Doe dem. Wright v. Manifold*, 1 Maul. & Selw. 294. Though the facts required to be observed in the due execution of a will be not sufficiently recorded on the instrument, yet it appears, that the will would not therefore be vitiated, if the necessary proof can be adduced. It would be a question for a jury to determine. *Lord Rancliffe v. Parkyns*, 4 Dow, 202. *Hands v. James*, Com. Rep. 530. *Croft v. Pawlet*, 2 Str. 109.

A marksman a sufficient witness within the statute.

If any of the witnesses be illiterate, and unable to write their names, an attestation by a marksman will be sufficient within the statute; as the solemn act of putting a mark is the same as signing. *Ellis v. Smith*, *supra*. *Harrison v. Harrison*, 8 Ves. 185.

*Addy v. Grix*, *supra*. But it is presumed, that the validity of the execution would be thereby weakened; for if in case of the death of the witnesses it should become necessary to prove the attestation of the will, it is scarcely possible to conceive that such a character can be given to a mark as to enable any person to prove its authenticity.

As to the credibility of witnesses.

Lord Mansfield, in the case of *Windham v. Chetwynd*, 1 Burr. 414, observed, that the credibility of witnesses was left by the statute of frauds to be judged of as cases should arise, by general principles, by analogy to the law of witnesses in other instances, and by arguments drawn from the nature and fitness of the thing with regard to justice, convenience, and intent of the statute. This case was decided on the supposition, that the word "credible," in the act, was only a word of course, and ought not to be intended so as to convey any special legal meaning; and that the other word "witness," was to be expounded by common law analogy; and that from the rule thus framed, it was con-

cluded, not only that a release or payment would re-establish the witness, if his incompetency really stood in the way, but further, that such a witness might, even without a release, be competent enough to prove the will for every person except himself. An interested witness could not be the witness the law intended to be present at the execution, and the statute had a main view to the quality of the witnesses; for a will is the only instrument in it required to be attested by subscribing witnesses at the time of execution; it was enough for leases, and all other conveyances, marriage agreements, declarations, and assignments of trust, to be in writing. These were all transactions of health, and protected by valuable considerations, and antecedent treaties; the power of a court of equity was fully sufficient to meet every fraud that could be practised in these cases, after the contract was reduced into writing. But a will was a voluntary disposition, executed suddenly in the last sickness, oftentimes almost in the article of death. This is the only question that can be asked in such cases—was the testator in his senses when he made it? And consequently, the time of execution is the critical minute that requires guard and protection. This is the reason why witnesses are called in so emphatically. What fraud are they to prevent? Even that fraud so commonly practised upon dying men, whose hands have survived their heads, who have still strength enough to write a name, or make a mark, though the capacity of disposing is dead. What is the condition of such an object; in the power of a few who are suffered to attend him, wheedled or teased into submission for the sake of a little ease? Put to the laborious task of recollecting the full state of all his affairs, and to weigh the just merits and demerits of those who belong to him; remembering all, and forgetting none? Such an act, to be done at such a time, is so pregnant with suspicion, that a formal declaration of the testator's sound and disposing mind and memory, though he is weak in body, is grown to be a common introductory clause to almost every testament. Who then shall secure the testator in this important moment from imposition? Who shall protect the heir at law, and give the world a satisfactory evidence that he was sane? The statute says,

three credible witnesses. What is their employment? To inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate, and refuse their attestation. In all other cases the witnesses are passive; here they are active, and in truth the principal parties to the transaction; the testator is entrusted to their care. Sanity is the great fact the witness is to speak to, when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *vivid voce* in Chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that court never to establish a will unless all the witnesses are examined, because the heir has a right to proof of sanity from every one of them whom the statute has placed about his ancestor.

Lord Camden, in the case of *Hindson v. Kersey*, 4 Burn. Ecc. Law, 88; declared, that he was obliged to differ from the opinion of the court of K. B. as to the construction of the word "credible" in the statute of frauds, as applied to witnesses to a will. Where the question was, whether one of the witnesses to the will was an insufficient witness within the statute of frauds, who, before the time of attestation, had been indicted, tried, and convicted for stealing a sheep, and was found guilty for the value of 10*d.* and had judgment of whipping. After three arguments at the bar, the whole court was clearly of opinion, that he was not a competent witness; and laid down as a rule, that it is the crime that creates the infamy, and takes away a man's competency, and not the punishment; for it is absurd and ridiculous to say, it is the punishment creates the infamy; the pillory has been always looked upon as infamous. But to shew the absurdity of this notion, suppose a man is convicted on the statute against deer-stealing, there is a penalty of 30*L.* to be levied by distress, and if he has no distress, he is to be put in the pillory: so that if the pillory be infamous, the person convicted (according to this notion), will be so, if he has not 30*L.*, but if he has 30*L.*, he will not be infamous. Petit larceny is felony: and there is no case where a person convicted thereof was ever admitted to

be a witness. *Pendock v. Mackender*, Willes, 667. But now a witness is not incompetent by conviction of petit larceny. 31 G. III. c. 35.

For removing the doubts which had arisen as to the persons Devise, &c. who are to be deemed legal witnesses, within the intent and meaning of the statute of frauds, the statute 25 Geo. II. c. 6, enacts, that, if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void, and such person shall be admitted as a witness to the execution of such will or codicil within the intent of the act, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will or codicil. And that in case, by any will or codicil, any lands, tenements, or hereditaments are or shall be charged with any debt or debts, and any creditor, whose debt is so charged, hath attested, or shall attest, the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act. And that if any legatee, before he shall give his testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof, such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest. And that in case any such legatee shall have died in the lifetime of the testator, or before he shall have received or released the legacy or bequest so given to him as aforesaid, and before he shall have refused to receive such legacy or bequest on tender made thereof, such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest. It

is also declared by the act, that the credit of every such witness shall be subject to the consideration and determination of the court and the jury before whom any such witness shall be examined, or his testimony or attestation made use of, or of the court of equity, in which the testimony or attestation of any such witness shall be made use of, in like manner, to all intents and purposes, as the credit of witnesses in all other cases ought to be considered of and determined.

Executor  
not benefici-  
ally inter-  
ested may  
be a wit-  
ness.

It has been decided, that a personal bequest to a subscribing witness is void, even where an attestation is not necessary, as in case of a testament of personal estate. *Lees v. Summersgill*, 17 Ves. 508. The wife of an acting executor, taking no beneficial interest under the will, is a competent attesting witness. *Bettison v. Bromley*, 12 East, 250. *Phipps v. Pilcher*, 6 Taunt. 220.

A testator appointed that his executors, in order to raise money for payment of his debts, &c. should, with all convenient speed after his decease, bargain, sell, and alien in fee simple, all his freehold lands, houses, and premises; for the doing, executing, and perfect finishing whereof the said testator gave his said executors and the survivor of them, and the executors, or administrators of such survivor, full power and absolute authority to grant, alien, sell, convey, and assure all the same freehold lands and premises to any person or persons and their heirs for ever, in fee simple, by all and every such legal ways and means in the law as to his executors or the survivor of them, or the executors and administrators of such survivor, or his or their counsel, should seem fit or necessary. This will was duly attested by three persons, one of whom was also one of the executors, to whom the beforementioned power of sale was given: the executors contracted for the sale of part of the testator's real estate. On a bill filed for a specific performance, it was objected that a good title could not be made, on the ground that the will was not duly attested. A case was, by order of the Vice Chancellor, sent to the Court of Common Pleas: the judges were of opinion that the executors could, by virtue of the power in them by the said will reposed, convey to the purchaser the legal estate and interest in the lands contracted to be sold; it was therefore decided by such opinion,

that the executor in trust under the will (who it must be observed was not beneficially interested) was a competent attesting witness. *Phipps v. Pilcher*, 1 Madd. 144. *S. C.* 6 Taunt. 220. But where a reversion in fee after an estate for life was devised to the wife of an attesting witness, and she died before the determination of the life estate, it was held that the husband was not a legal witness. *Hatfield v. Thorp*, 5 Barn. & Ald. 589.

Sealing is not necessary to a will; yet, when it is a circumstance required in the execution of a power, it cannot be dispensed with. *Dormer v. Thurland*, 2 P. Wms. 506. *MacAdam v. Hogan*, 3 Bro. Ch. Rep. 310.

In *Ross v. Ewer*, 3 Atk. 161, Lord Hardwicke said, that publication is, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form, and mentioned a trial at bar in the Court of K. B. where the only question was, whether the testator published the will? for there was no doubt of his executing it in the presence of three witnesses, or of their attesting it in his presence. It has on the other hand been decided, where the witnesses were deceived by the testator at the time of the execution, and were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed, and not a will, the testator declaring the same as his act and deed, and the words "sealed and delivered" being put above the place where the witnesses were to subscribe their names, that this was a sufficient execution. *Trimmer v. Jackson*, cited 4 Burn. Ecc. Law, 119. *Tollett's case*, Moseley, 46. It is not necessary, said Lord Mansfield, that a testator should declare the instrument he executes to be his will. *Bond v. Seawell*, 3 Burr. 1775.

A will made by a blind man need not be read over to him in the presence of the attesting witnesses; but in the case of a testator who is blind, stronger evidence would be required, such as the peculiarity of the case seems to call for; and sufficient proof must be given to rebut any imputation of fraud. *Longchamp dem. Goodfellow v. Fish*, 3 New Rep. 415.

As to publication of will.

## CODICIL.

**CXLVI.** Whereas I, A. B. of, &c. have made and duly executed my last will and testament in writing, bearing date on or about the day of , 1826. Now I do hereby declare this present writing to be a codicil to my said will, and I direct the same to be annexed thereto, and taken as part thereof. I do hereby give and bequeath, &c. And whereas I have by my said will given and bequeathed to, &c. Now I do hereby revoke the said legacy so given to the said and I give to the said the sum of £ only. And I do hereby ratify and confirm\*

Recital of bequest in the will.

Revocation thereof, and additional bequest.

Republication.

In what cases necessary.

Effect of republication.

\* The republication of a will must be attended with the solemnities which are to be observed at the original publication. *Bunker v. Cooke*, Doug. 35.

A will, when re-executed and republished, has the same force and operation as if it were made at the time of such republication. A will made during the existence of any disability, as for instance, of infancy or of coverture, must be actually republished after the removal of the disabilities; any other adoption of the instrument will not render the same a valid will. See note "Testamentary incapacity," p. 28.

When a will is republished, the effect is, that the terms and words of the will shall be construed to speak with regard to the property of which the testator is possessed at the date of the republication, just the same as if he had been possessed of such property at the time of making his will. Consequently, lands purchased after the date of the will, and previously to its republication, will pass under the will, if the terms of the devise in the will are sufficiently comprehensive to include such newly purchased

my said will in every respect, except where the same is hereby revoked and altered as aforesaid. In witness whereof I the said A. B. have to this codicil set my hand and seal, this day of , 1826.

*Lands.* It also follows, that as a republication of a will makes no alteration in the words of it, but only causes it to take effect from the time of republication, if any change has taken place with respect to the devisees named in the will, republication will not be effectual; but a codicil should be added, in which the consequence of such change may be provided against; for as the persons named in the will cannot take in a different manner than was contemplated at the time of making the will, the intention of the testator might be frustrated; as where lands are devised to A. and his heirs, and A. dies during the life of the testator, the heirs of A. cannot take under the devise, although the will be republished.

A devise of lands may also be republished by codicil referring to and confirming the will; such codicil being executed in the presence of three witnesses. *Acherley v. Vernon*, 9 Mod. 68. <sup>operates as a republication.</sup>

3 Bro. Parl. Ca. 107. *Carte v. Carte*, 3 Atk. 174. Although this doctrine was shaken by the decision of Lord Camden, in the case of the *Attorney-General v. Downing*, Amb. 571, yet it has been firmly established by subsequent decisions. Lord Commissioner Eyre observed, (see *Barnes v. Crowe*, 4 Br. Ch. Ca. 2. 1 Ves. jun. 486), that the decision in *Acherley v. Vernon* was of so much authority, that every thing must yield to it. That the principle that a codicil attested by three witnesses, shall be a republication, seemed intelligible and clear. The testator's acknowledgment of his former will, considered as his last will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; because it supposes a former will, refers to it, and becomes part of it; and being attested by three witnesses, his implied declaration and acknowledgment seem also to be attested by three witnesses. *Pigott v. Waller*, 7 Ves. 98. *Holmes v. Coghill*, 7 Ves. 499.

In the case of republication of a will by codicil, in order to comprise after-purchased lands, a general reference should be made to all such lands; otherwise, if the codicil be restricted in its operation to the estates expressly devised by the will, the codicil will not be a republication of the will, so as to extend the operation of the will to the real estates purchased after the will was executed; for if it appear upon the face of the codicil, that it was not the intention of the testator to pass any other lands than those which were devised by the will, it would be a contradiction to make the codicil pass after-purchased lands. *Lady Strathmore v. Bowes*, 7 T. R. 482. *Goodtitle* dem. *Woodhouse v. Meredith*, 2 Maule & Selw. 5. *Hulme v. Heygate*, 1 Meriv. 285. Nor should the codicil be restricted to a particular purpose. *Parker v. Biscoe*, 3 Moore, 24. But if the codicil be executed in the presence of three witnesses, though it relate to personalty only, it will be a republication of a will, so as to pass real estate. *Powell v. Cleaver*, 2 Br. Ch. Ca. 511.

As to the re-establishment of a will once revoked.

In order to set up a will that has been revoked by a subsequent will, it is desirable not to trust merely to the destruction of the second will, but actually to republish the former will. (See note "Revocation.")

For the purpose of re-establishing a will which has been cancelled, it should be actually re-executed. *Burtenshaw v. Gilbert*, 1 Cowp. 49. *Pemberton v. Pemberton*, 13 Ves. 290. But the cautious practitioner will, in such case, be induced rather to recommend the cancelled will to be written and executed afresh, than that the testator should re-execute an instrument which has been once cancelled, and may also have been defaced.

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## ERRATA.

*Page*, 1, 1st and 2nd line *dele* parenthesis.  
50, last line, *for Keates v. Burton*, 14 Ves. 434. *read* Sug.  
    Pow. App. No. 1.  
180, marginal reference to clause lxiv. *read* "appropriation of  
    capital."

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